

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

In the matter of the adoption of New	)	NOTICE OF ADOPTION,
Rules I through IX, amendment of	)	AMENDMENT, AND REPEAL
ARM 37.106.2802, 37.106.2803,	)	
37.106.2804, 37.106.2805,	)	
37.106.2809, 37.106.2810,	)	
37.106.2814, 37.106.2815,	)	
37.106.2816, 37.106.2817,	)	
37.106.2821, 37.106.2822,	)	
37.106.2823, 37.106.2824,	)	
37.106.2829, 37.106.2835,	)	
37.106.2836, 37.106.2838,	)	
37.106.2847, 37.106.2849,	)	
37.106.2854, 37.106.2855,	)	
37.106.2860, 37.106.2866,	)	
37.106.2875, 37.106.2885,	)	
37.106.2896, and 37.106.2904, and	)	
repeal of ARM 37.106.2886	)	
pertaining to assisted living rules	)	
related to background checks and	)	
category D endorsement	)	

TO: All Concerned Persons

1. On May 27, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-979 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 746 of the 2022 Montana Administrative Register, Issue Number 10.

2. The department has adopted the following rules as proposed: New Rules I (37.106.2899), III (37.106.2899B), VI (37.106.2899E), VII (37.106.2899F), and IX (37.106.2899H).

3. The department has adopted the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE II (37.106.2899A) CATEGORY D: ADMINISTRATOR  
QUALIFICATIONS (1) In addition to requirements in ARM 37.106.2873, an administrator for a category D facility must have a least three years of experience in the field of mental health and mental disorders.

(2) Of the 16 hours of annual continued education training required in ARM 37.106.2814, eight hours must be in the field of mental health and mental disorders.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA  
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

NEW RULE IV (37.106.2899C) CATEGORY D: STAFF (1) and (1)(a)  
remain as proposed.

(b) a ~~full-time~~ licensed mental health professional who must be site-based;  
and

(c) remains as proposed.

(2) through (2)(b) remain as proposed.

(c) complete four hours of annual training related to mental health and mental disorders;

(d) through (3) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA  
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

NEW RULE V (37.106.2899D) CATEGORY D: RESIDENT ASSESSMENTS

A category D facility must obtain or conduct three types of resident assessments for each resident:

(1) Prior to move in, the facility shall obtain the court determination documentation required in ~~50-5-224(3)~~ 53-21-199, MCA, as applicable, as well as a full medical history and physical and mental health and mental disorders assessment.

(2) and (3) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA  
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

NEW RULE VIII (37.106.2899G) CATEGORY D: DISCHARGE (1) through (3) remain as proposed.

(4) All discharges must be discussed with the resident or resident's legal representative and the resident's practitioner to ensure collaboration on a safe and appropriate discharge location.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA  
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

4. The department has amended the following rules as proposed: ARM 37.106.2802, 37.106.2803, 37.106.2804, 37.106.2809, 37.106.2810, 37.106.2814, 37.106.2815, 37.106.2817, 37.106.2821, 37.106.2822, 37.106.2824, 37.106.2829, 37.106.2835, 37.106.2836, 37.106.2838, 37.106.2847, 37.106.2849, 37.106.2854, 37.106.2860, 37.106.2866, 37.106.2875, 37.106.2885, 37.106.2896, and 37.106.2904.

5. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.106.2805 DEFINITIONS The following definitions apply in this subchapter:

- (1) through (15) remain as proposed.
- (16) "Mental health professional" means:
  - (a) a certified professional person under Title 53, chapter 21, part 1, MCA;
  - (b) through (f) remain as proposed.
  - (g) an advanced practice registered nurse, as provided for in 37-8-202, MCA, with a clinical specialty in psychiatric mental health and mental disorders nursing; or
  - (h) remains as proposed.
- (17) through (32) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA

IMP: 50-5-225, 50-5-226, 50-5-227, MCA

37.106.2816 ASSISTED LIVING FACILITY STAFFING (1) through (2)(a) remain as proposed.

(i) If an applicant has lived outside the state within the past five years, the assisted living facility must complete background checks in every state in which the applicant has resided within the past five years or unless the name-based background check yields nationwide results, or the facility may conduct an FBI fingerprint background check.

(b) remains as proposed.

~~(i) Indications that an employee may pose a risk or threat to the health, safety, and welfare of the residents of the facility include self-reported or otherwise known history of abuse, neglect, or exploitation, pending legal proceedings, currently on parole or probation, or any other indicator the facility determines reasonable.~~

(c) through (9) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA

IMP: 50-5-225, 50-5-226, 50-5-227, MCA

37.106.2823 RESIDENT AGREEMENT (1) through (1)(c) remain as proposed.

(d) a statement explaining the resident's responsibilities including house rules, the facility grievance policy, facility smoking policy, facility policy regarding pets, and the facility policy on medical and recreational marijuana use. ~~A facility policy on medical marijuana must follow 50-46-318 and 50-46-320, MCA;~~

(e) through (2) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA

IMP: 50-5-225, 50-5-226, 50-5-227, MCA

37.106.2855 INFECTION CONTROL (1) through (1)(c) remain as proposed.

(d) ~~the any other~~ circumstances under which the facility must prohibit employees with a communicable disease or infected skin lesions from direct contact with residents or their food, if direct contact will transmit disease;

(e) through (2) remain as proposed.

AUTH: 50-5-103, 50-5-226, 50-5-227, MCA  
IMP: 50-5-225, 50-5-226, 50-5-227, MCA

6. The department has repealed the following rule as proposed: ARM 37.106.2886.

7. 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: A commenter proposes that anywhere "mental health" is mentioned in the new rules, that it be replaced with "mental disorders" to include neurocognitive disorders, such as Alzheimer's and dementia.

RESPONSE #1: The department agrees with the comment in part and has made changes to New Rules II, IV, V, and ARM 37.106.2805 as appropriate.

COMMENT #2: A commenter proposes that New Rule I and II include a requirement for experience and continuing education in memory/dementia care.

RESPONSE #2: The department does not agree since revisions to another rule that is applicable to all assisted living facilities includes the need for two hours of annual training in dementia care. With the changes to New Rules II and IV, pursuant to the response to Comment #1, some required continuing education will relate to mental health and mental disorders, which includes Alzheimer's and dementia.

COMMENT #3: A commenter requests that category D assisted living facilities be able to attach a secured unit to a skilled nursing facility.

RESPONSE #3: The department does not agree. A, B, C, and the proposed D categorizations are assisted living categorizations and can only be applied to assisted living facilities. If a skilled nursing facility wants to provide category D services, the skilled nursing facility needs to apply for assisted living facility licensure and indicate which categories of assisted living it wants to provide.

COMMENT #4: A commenter suggests expanded dictation on what accounts for the "mental health" training in the requirement. Additionally, the commenter recommends the annual mental health training be reduced to four hours out of the 16 total continuing education hours required for administrators, instead of the proposed eight hours.

RESPONSE #4: See response to Comment #2. Additionally, the Administrative Rules of Montana (ARM) places the full responsibility of the facility, resident care, documentation, etc., on the administrator. Therefore, the department believes it

essential for the category D administrator to have a significant amount of training in mental disorders.

COMMENT #5: A commenter suggests adding the language "The facility must assist with discharge to ensure safe and appropriate placement of the resident" to New Rule VIII.

RESPONSE #5: This requirement is already found in the Assisted Living regulations for discharge, and therefore would apply to a category D endorsement for assisted living facilities.

COMMENT #6: A commenter makes the suggestion to provide clarity on mental illness versus Alzheimer's disease and related dementia.

RESPONSE #6: See response to Comment #1.

COMMENT #7: A commenter requests clarifications to New Rule IV provisions related to a full-time mental health professional, given that a category D facility may not only have mental health residents; requests the requirement for FBI background checks be removed as there are already background check guidelines for assisted living facility staff in place; requests clarification on which staff will need to complete four hours of annual training on mental health and mental disorders, training on de-escalation techniques, and methods of managing behaviors.

RESPONSE #7: The department agrees with the comment and has eliminated the phrase "full-time" and has updated the rule to reflect the changes. Taking into consideration the changes that will be made in response to Comment #1, the language is changed to mental health and mental disorders. Given the title to New Rule IV, "Category D: Staff," it is clear that New Rule IV pertains to staff employed to work in a category D facility.

COMMENT #8: A commenter suggests language be added to New Rule IV stating that the two hours of training in dementia care are to be provided by a memory/dementia care trained professional.

RESPONSE #8: The department does not agree. A definition of such professional would need to be determined as this is not currently a medically recognized profession.

COMMENT #9: A commenter requests clarification if category D can accept a resident who is not on a court-ordered diversion from the Montana State Hospital.

RESPONSE #9: New Rule V will be updated to include "as applicable" to the requirement to obtain a copy of the court determination as it is not a requirement that category D residents be on a court-ordered diversion from Montana State Hospital.

COMMENT #10: A commenter suggests removing the section of New Rule VI that requires each direct-care staff member to document that they have reviewed and are capable of implementing each resident's health care plan.

RESPONSE #10: The department does not agree with this suggestion. Health care plans are developed to identify the needs and goals of residents, who is responsible for carrying out interventions to have those needs and/or goals met, and what services the resident needs. The department believes it is imperative that direct-care staff review and familiarize themselves with individual resident health care plans to ensure that they know how to care for the residents they serve, and how to protect the health, safety, and welfare of the residents. Documentation by signature of staff is acknowledgment of the ability to care for the residents and holds them accountable.

COMMENT #11: A commenter suggests adding the language "all discharges must be discussed with the resident, the resident's legal representative, and the resident's practitioner" in New Rule VIII.

RESPONSE #11: The department agrees and has made changes to New Rule VIII.

COMMENT #12: A commenter indicates that a memory/dementia care trained professional should be required for category D, added to category D regulations, and therefore added to the definitions rule.

RESPONSE #12: See response to Comment #8.

COMMENT #13: A commenter requests clarification on who is "a certified professional" and what certifications meet the requirement.

RESPONSE #13: The department refers to 53-21-106, MCA. The department adds the Montana Code Annotated (MCA) reference to the rule suggestion, in response to this comment.

COMMENT #14: A commenter suggests removing the requirement for facilities to submit new policies for department review.

RESPONSE #14: The department's intent in this requirement is to eliminate the potential that a facility write into policy something that is inconsistent with provision(s) in the ARM or MCA. Depending on current licensure of the facility, it could be up to three years before the department is onsite to review the facility's policies and procedures and finds the noncompliance. The department does not regulate policies that do not pertain to the licensure of the assisted living facility or the care of the residents served.

COMMENT #15: A commenter recommends removing the requirement that assisted living facility providers must obtain background checks from each state an applicant has lived in if they have lived outside of Montana in the last five years.

RESPONSE #15: The department partially agrees with the recommendation. The department has changed wording in ARM 37.106.2816(2)(a)(i) to exclude the need to run individual state background checks if the facility is using a background check company that does a nationwide check.

COMMENT #16: A commenter recommends removing the listed indications that an employee may pose a risk or a threat to the health, safety, and welfare of the residents in an assisted living facility and make the language reflect that of the statute.

RESPONSE #16: The department partially agrees with the recommendation. The department agrees to remove (i) from ARM 37.106.2816(2)(b) listing indications that could pose a risk to health, safety, and welfare of the residents.

COMMENT #17: A commenter suggests removing requirements of two hours initial and annual dementia training, and removal of proposed addition of five rights of medication administration training.

RESPONSE #17: The department does not agree with this suggestion. With an increase in mental disorders in assisted living facilities, initial and annual refresher training is necessary to safely and effectively care for residents. Medication administration training is necessary because most assisted living facilities store and dispense resident medications to their residents. Basic training on medication administration is imperative to ensure the health and safety of the residents receiving their medications.

COMMENT #18: A commenter states support for enacting an annual dementia/cognitive impairment training for staff.

RESPONSE #18: The department agrees with this statement and made relevant revisions to ARM 37.106.2816(3)(g), as proposed.

COMMENT #19: A commenter recommends removing the requirement that assisted living facilities have a marijuana policy.

RESPONSE #19: The department does not agree with this recommendation. With the recent legalization of marijuana, the department's position is that a clear policy on marijuana use safeguards residents and staff.

COMMENT #20: A commenter makes note that the MCA referenced in the proposed requirement for a marijuana policy has been repealed.

RESPONSE #20: The department makes note of the MCA repeal and has removed the MCA reference.

COMMENT #21: A commenter suggests implementing Home and Community Based Services (HCBS) setting rule into the requirement that the resident agreement include a statement explaining resident's responsibilities to the house rules.

RESPONSE #21: The department does not agree with this suggestion. Not all assisted living facilities are HCBS providers. Additionally, the department believes that adding this requirement would create an expectation that the licensure bureau monitor for compliance not only with the agreement, but also with the settings rule since it would be in the resident agreement. The health care facility surveying staff will not be conducting settings evaluations or compliance monitoring for HCBS services.

COMMENT #22: Two commenters stated their support of the changes to the involuntary discharge 30-day notice rule for various reasons.

RESPONSE #22: The department thanks the commenters for their support of these changes.

COMMENT #23: Several commenters did not support the changes to the involuntary discharge 30-day notice rule. Commenters included reasons such as: not in the best interest of the resident, removes responsibility from the facility to find discharge locations, should only be used for when a resident is a danger to themselves or others but not for failure to pay or decline in activities of daily living (ADLs). Some commenters claimed that the addition of the language "the facility must assist with discharge to ensure safe and appropriate placement of the resident" is vague and needs "more teeth" to safeguard residents from being discharged to the streets or homeless shelters.

RESPONSE #23: The department believes that a change to this rule is required to initiate the discharge process for a 30-day notice. The current rule does not allow that the notice of need to discharge even be given to the resident without a confirmed place of discharge indicated on it. The intent of this rule change is to facilitate assisted living providers to be able to start the discharge process without having an exact place of discharge determined before issuing the notice. The facility, pursuant to the addition of (5), would still be responsible for assisting with the discharge during that 30-day notice period. The right to a fair hearing, and the fair hearings process, provides a review to ensure discharges are occurring appropriately.

COMMENT #24: A commenter expresses they do not feel any facility should be allowed to have rooms that house more than two residents. This is in reference to ARM 37.106.2835.

RESPONSE #24: The department disagrees with this comment. Any facility currently housing more than two residents to a room may have a loss of revenue if required to delicense beds due to the number of residents per room. The

department notes that if the facility changes occupancies or owners, the facility is then required to meet current standards which would remove the allowance of more than two residents per room. The rule indicates any previously licensed facility, which by reference would have been a facility licensed before 2004, may retain four residents to a room, but any newly licensed facility, including facilities that go through a change of ownership – as mentioned above – may only have a maximum occupancy of two residents per room.

COMMENT #25: A commenter suggests changing the wording "the" to "any other" in ARM 37.106.2855(1)(d).

RESPONSE #25: The department agrees, and has made changes to the applicable rule.

COMMENT #26: A commenter recommends removing portions of the infection control proposed rules, and referencing adhering to CDC guidance instead.

RESPONSE #26: The department does not agree with these recommendations. During the COVID-19 pandemic, numerous assisted living facilities did not have adequate infection control policies and procedures in place to mitigate widespread infectious disease. Before COVID-19, assisted living facilities were able to send very ill, highly infected residents to hospitals for treatment. Due to over capacitation and staff shortages at hospitals and skilled nursing facilities during the COVID-19 pandemic, assisted living facility providers could not send their infected residents to these facilities. The department finds it necessary that all assisted living facility providers have infectious disease control policies and procedures in place for when they have to track, mitigate, and treat residents with infections/infectious diseases.

COMMENT #27: New Rule I – A commenter states that the entrance/exit to/from the category D unit to the other portion of the assisted living facility be restricted and to require the department to make policies for facilities to maintain security of the facility/unit.

RESPONSE #27: The department agrees in part with this comment. The rule already includes the requirement for an impenetrable door between units if connected. The department disagrees with the suggestion that the department write policies for category D facility security. Policies are the responsibility of each individual facility.

COMMENT #28: New Rule II – A commenter suggests that the requirement for three years of experience be changed to one year and to be verifiable. They suggest the experience must be in administration of mental health. Also, the applicant should be a Montana licensed professional. They suggested that the annual continued education be increased to 24 hours a year, instead of 16.

RESPONSE #28: The department disagrees with these comments. The department does not verify experience of individuals employed at health care

facilities. Requiring a category D administrator to be a licensed Montana professional plus having experience in mental health administration limits the potential pool of individuals eligible to become category D administrators. Since the rules set for numerous other licensed professionals to be involved with the operations of the category D facility, the department believes the requirement of increasing the number of continuing education units per year by eight is unnecessary.

COMMENT #29: New Rule III – A commenter suggests that facilities must allow a resident or legal representative 48 hours to review disclosure documents required in (1) and the administration must be available in those 48 hours to answer any questions.

RESPONSE #29: The department disagrees with this comment. Additional time requested to review documents, and the availability of the administrator for questions can done on a case-by-case basis and determined between the facility and a resident/resident legal representative independently.

COMMENT #30: New Rule IV – A commenter suggests requiring a registered nurse (RN) in the facility eight hours a day, seven days a week, require a full time licensed mental health professional be within the facility, create a staff ratio of 1:5 on category D, and add "criminal background check" to the name based or FBI background check.

RESPONSE #30: The department disagrees with these comments. Facilities are responsible for determining RN coverage based on census, clientele, needs, etc. The department does not agree with creating a staffing ratio as staffing is based on resident needs, not number of residents. The intent of the name-based or FBI background check is that it be used for criminal history evaluation to determine eligibility to work in assisted living facility.

COMMENT #31: New Rule VII – A commenter questions why a category B resident would be in a category D unit.

RESPONSE #31: Residents with category D, like category C, will need dual categorizations applied. The categorization of residents as A/B is to indicate functional level – the extent of assistance they will need for completion of ADLs, or the requirement of skilled services needed for care. Categorization of residents as C/D will be determined based on cognitive/mental disorder. Facilities are responsible to document both the functional, and as appropriate, cognitive/mental status and needs of their residents – i.e., A/C, A/D, B/C, B/D.

COMMENT #32: New Rule VIII – A commenter suggests that discharges be discussed with the resident or resident's legal representative.

RESPONSE #32: See response to Comment #11.

COMMENT #33: ARM 37.106.2803 – Two commenters suggest not repealing ARM 37.106.2886 because they believe it removes responsibility of MAR documentation for category B and category C residents.

RESPONSE #33: The department disagrees with this comment. ARM 37.106.2886 is a duplicate of ARM 37.106.2849. ARM 37.106.2849 applies to category B and C residents, and will also apply to category D residents.

COMMENT #34: ARM 37.106.2805 – A commenter suggests keeping the language "but are not limited to" in ARM 37.106.2805(14).

They suggest to (1) define a certified professional person; (2) require an LPC or LCPC, instead of saying a professional counselor; (3) specify a LMSW instead of a social worker licensed under Title 37, MCA; (4) remove marriage and family therapist; and (5) allow for an advanced practice registered nurse (APRN), but exclude nurse practitioners, nurse-midwives, nurse anesthetists, and clinical nurse specialists in ARM 37.106.2805(15).

They suggest removing the language "other labeled container" and change to "original labeled container" in ARM 37.106.2805(25)(c).

They also suggest not removing the "significant event" terminology in ARM 37.106.2805(28).

RESPONSE #34: The department disagrees. The department proposes to replace "but are not limited to" with "include." By definition, "include" means "include, but is not limited to."

The facility is required to ascertain the ability to practice under Title 37, MCA, for professional counselor and social worker and determine if the licensed individual can meet the residents' needs. The rule as written specifies the requirement for an APRN in that scope and does not need to address the types of nursing professionals that are excluded.

A change to "original" is not necessary for the intent of the rule.

The department disagrees because the removal of the definition of "significant event" and the addition of the definition of "significant change" is intended to better serve assisted living residents because "significant change" better encompasses the overall health of the resident and therefore is more accurate in determining level of care and needs in comparison to "significant event."

COMMENT #35: ARM 37.106.2814 – The commenter suggests additional number, timing, and specific training requirements for assisted living providers.

RESPONSE #35: The department disagrees with this comment. The department feels that 16 continuing education units per year is adequate for assisted living

administrators, and there is not a need for all assisted living administrators to receive the proposed additional hours and types of training.

COMMENT #36: ARM 37.106.2815 – A commenter suggests an updated policies and procedures manual be kept on file at the department.

RESPONSE #36: The department disagrees with this comment. The facility is required to maintain an updated policies and procedures manual that is available to staff, residents, legal representatives, and representatives of the department at all times. Thus, it is unnecessary for the department to also maintain a copy of the manual.

COMMENT #37: ARM 37.106.2816 – A commenter suggests requiring that all direct-care staff be over the age of 18, have a high school diploma or General Education Diploma (GED), and be certified nursing assistants (CNA).

They also state that the administrator should provide written documentation of findings of background checks and not allow an applicant to work provisionally pending the results of a background check.

They also recommend additional training including more hours and that specific topics be added to staff training.

They suggest reviews of service plans be documented by staff and a supervisor and should be kept in the staff file for three years after the employee leaves.

They recommend that there should be an increase to two persons per shift trained in cardiopulmonary resuscitation (CPR), provide for staff ratios for category C facilities, and recommend all category C staff must have keys to all relevant areas.

RESPONSE #37: The department disagrees with this comment. The facility determines appropriateness and eligibility of a person to be hired who is of legal age to work. The facility is responsible to train that staff to be able to perform their job duties, which can be done with someone under the age of 18 who has not completed school. Employment of CNAs is optional, but is not required.

The department does not agree that the administrator be the one who is mandated to document, in an employee file, background check results. Other qualified personnel could do this. MCA provides the ability to work provisionally pending background check. Not to permit such provisional work would be inconsistent with the law.

Additionally, training for staff and amounts of training are left to the discretion of the facility since all assisted living facilities are different in size and serve different clientele.

The department does not see any reason why having two CPR certified staff per shift is necessary.

The review of and documentation of review of a resident service plan is part of a resident file, not staff file, so the proposal that this be kept in a staff file is unnecessary.

The department disagrees with creating staffing ratio as staffing should be based on resident needs, not number of residents. One staff on shift with keys to all relevant areas within a facility is adequate to meet needs for facility operations and resident health safety and welfare.

COMMENT #38: ARM 37.106.2817 – A commenter suggests requiring the employee, administrator, and certified trainer to sign documentation of employee initial orientation and training received prior to entering category C facility, include the wording "name and/or FBI fingerprint and" into the requirement to keep the results of the employee criminal background check in the employee file.

RESPONSE #38: The department disagrees with these comments. There is no requirement, or definition, of a certified trainer for assisted living facility staff. The administrator, pursuant to ARM 37.106.2814, is already responsible for oversight of all facility functions, including staff training and documentation which would encompass employee orientation documentation. The department does not feel reiteration is needed.

COMMENT #39: ARM 37.106.2821 – A commenter suggests the department specify that the RNA include current Primary Care Physician prescribed medication instead of just current medication, require that a licensed healthcare provider (LHCP), as defined in ARM 37.106.2805, be designated to do the assessment of a resident when a resident or facility is appealing a rejection or relocation decision, and that this nurse not be affiliated with the facility or the state.

RESPONSE #39: The department disagrees with these comments. The purpose of having current medication on the RNA is for it to represent the complete picture of all medications taken by the resident. If a resident has more than one doctor, the RNA would not include all the resident's medications if it were to only encompass the medications prescribed by one provider. The state cannot collect money for an assessment and assign an assessment to be completed by a LHCP if that individual does not work for the department.

COMMENT #40: ARM 37.106.2822 – The review of the service plan will include personal contact with the resident or resident's legal representative, and if the resident is in category C the legal representative must be present.

RESPONSE #40: The department disagrees with this comment. While the department expects that involvement of the resident or resident legal representative would be part of the interdisciplinary group, it will not mandate personal contact or

that a legal representative be present at the service plan review. Such requirements could be unreasonable because there are many situations where legal representatives are in a different state than the resident or are unreachable by phone during times of review.

COMMENT #41: ARM 37.106.2823 – A resident or resident legal representative shall be given 48 hours' notice to review resident agreement before signing, the agreement must include criteria for requiring transfer within the facility or if to another facility, and the facility must fully explain all appendix, addendums, and disclosures.

RESPONSE #41: The department disagrees with this comment. This is not a licensing issue, and arrangements such as these could be made between the provider and the resident/resident legal representative independently.

COMMENT #42: ARM 37.106.2824 – (1)(b) and (c) should pertain to only category A facilities, there should not be removal of the requirement to have the discharge location on the 30-day notice, and there should be separate rules for discharges for category C residents.

RESPONSE #42: The department disagrees with these comments. See response to Comment #23. Residents within assisted living facilities all have the same discharge criteria and there is not discrimination based on categorization.

COMMENT #43: ARM 37.106.2829 – Keep the requirement of a resident application form, require category B and C residents to be weighed more frequently, and do not remove the requirement to ascertain a provider's response to a significant event.

RESPONSE #43: The department disagrees with this comment. The application process is outdated. With more residents coming from acute care settings to assisted living facilities, it is difficult to require applications when transfers are referrals from other facilities such as a hospital or skilled nursing facility. The department sees no rationale as to why a category B or C resident would need to be weighed more frequently than a category A resident. If a resident is experiencing weight fluctuations, a practitioner can order treatment or increased monitoring on a case-by-case basis. The department removes the rule stating that a facility must maintain documentation of the provider's response to an event because it may not be reasonably achieved because neither the facility nor the licensing department has control over whether a provider or practitioner responds to the report of a significant event.

COMMENT #44: ARM 37.106.2847 – Include notification to the resident's legal representative of refusal of medications, changes to the dose or schedule of medications on the MAR by recorded by an appropriate LHCP.

RESPONSE #44: The department disagrees with these comments. Residents have the right to privacy and can determine for themselves who they want to know about their medical conditions and medications, and if they have a legal representative, the facility has the responsibility for determining what rights the legal representative may have based on the documents by which the legal representation was established. The requirement that a LHCP be the person to make changes to the MAR in schedules or doses is not attainable as there is no requirement to have a LHCP on shift at all times, and medication doses or schedules need to be documented timely.

COMMENT #45: ARM 37.106.2849 – Add legal representative to notification of medication errors and add requirement that PRN medication only be refilled when there is a seven day or less supply.

RESPONSE #45: The department disagrees with these comments. See response to Comment #44. The department does not direct facilities on refilling medications as that is between the facility and the dispensing pharmacy.

COMMENT #46: ARM 37.106.2855 – Add the requirement that a staff member must have a doctor's release to return to work after having a communicable disease.

RESPONSE #46: The department disagrees with this comment. The facility is responsible to set standards for ensuring staff who have had a communicable disease are safe to return to work. A requirement to have a doctor's order to return to work could delay an eligible person's ability to return to work substantially if the person had to wait to be seen by a doctor, which could result in loss of wages for the staff, and insufficient staff coverage for the facility.

COMMENT #47: ARM 37.106.2860 – Keep the requirement of adhering to ARM Title 37, chapter 110, subchapter 2.

RESPONSE #47: The department removed this requirement because, except for ARM 37.110.201, this entire subchapter has been repealed. ARM 37.110.201 provides MCA references for retail food establishments under Department of Labor and Industry (DLI). Assisted living facilities are not required to abide by these standards as not all assisted living facilities sell retail food. Those that do would have their food retail establishment reviewed and certified by DLI.

COMMENT #48: ARM 37.106.2866 – Require that fire drills be full evacuation drills and be done in a time frame established by the local fire jurisdiction and require that all drills include documentation of the amount of time it took to evacuate all residents.

RESPONSE #48: The department disagrees with these comments. The local fire jurisdiction has the authority to require facilities to perform full evacuation drills and the department requires facilities to adhere to the requirements established by their local jurisdiction. There is no need for the department to include such specific requirements on the subject in its regulations.

COMMENT #49: ARM 37.106.2875 – Require that the review/update of the health care plan be in consultation with the resident, resident legal representative, and resident LHCP, and that the health care plan be readily available to the resident and/or the resident's legal guardian.

RESPONSE #49: The department disagrees with adding this language to the rule. The intent of the rule is that those responsible for the health care plan – which would include the resident or their legal representative – would all be involved in the review and update. Health care plans are not meant to be an internal document, but instead, a document used as a guide to provide care.

COMMENT #50: ARM 37.106.2885 – Change the requirement that orders received over the phone are confirmed by written orders in 24 hours instead of 21 days, add that a resident could be categorized B "or C" resident if the resident is unable to request or validate need for PRN medication, require the facility to report refusal of medication to the legal representative, and remove the unlicensed individual portion of (c) and change to Medication Aide I or II.

RESPONSE #50: The department disagrees with these comments. The assisted living facility cannot ensure a doctor will put into writing a telephone order within 24 hours. The addition of "or C" for classification of whether or not a resident can request/confirm need for PRN medication is unnecessary, as the designation of category C is related to their cognitive ability with respect to basic care decisions and elopement, not medication administration. See response to Comment #44. The rule that permits an unlicensed individual to administer medications under the delegation of an individual licensed by the Montana Board of Nursing already includes Medication Aide I persons, as these individuals are not licensed, but certified. There are additional identified unlicensed individuals who can be delegated to give medications, as determined by the Montana Board of Nursing; the department supports the delegation standards set forth by the Montana Board of Nursing and, accordingly, maintains the current language.

COMMENT #51: ARM 37.106.2896 – Require the disclosures to category C legal representatives be given in writing and in person, and that the disclosure must include the evidence-based dementia care training program used at the facility.

RESPONSE #51: The department disagrees with these comments. The requirement to have legal representatives be given information in person would be unattainable in situations where legal representatives are not in the same town or state as the resident. There is no requirement for, or definition of, an "evidence-based dementia care training program" and therefore the department cannot make it a requirement. Each facility is responsible for making a determination on training to ensure that staff can adequately perform their job duties and ensure the health, safety, and welfare of the residents in its facility.

/s/ FLINT MURFITT  
Flint Murfitt  
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.