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MINUTES

MONTANA HOUSE OF REPRESENTATIVES
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON HUMAN SERVICES

Call to Order: By **CHAIRMAN BILL THOMAS**, on March 21, 2001 at 3:00 P.M., in Room 172 Capitol.

ROLL CALL

Members Present:
Rep. Bill Thomas, Chairman (R)
Rep. Roy Brown, Vice Chairman (R)
Rep. Trudi Schmidt, Vice Chairman (D)
Rep. Tom Dell (D)
Rep. John Esp (R)
Rep. Tom Facey (D)
Rep. Dennis Himmelberger (R)
Rep. Larry Jent (D)
Rep. Michelle Lee (D)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. Holly Raser (D)
Rep. Diane Rice (R)
Rep. Rick Ripley (R)
Rep. Clarice Schrumpf (R)
Rep. Jim Shockley (R)
Rep. James Whitaker (R)

Members Excused: Rep. Daniel Fuchs (R)

Members Absent: None.

Staff Present: David Niss, Legislative Branch
Pati O'Reilly, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 248, SB 288, SB 324, SB 459, SB 476, 3/18/2001
Executive Action: SB 288, SB 324, SB 459, SB 476, SB 361, SB 290, SB 477, SB 181

HEARING ON SB 248

Sponsor: SEN. DUANE GRIMES, SD 20, Clancy

Proponents: Pam Hanson, Holy Rosary Healthcare, Miles City
Dr. Larry McEvoy, Deaconess Billings Clinic
Fritz Pierce, Billings, attorney
Jim Ahrens, President, Mt. Hospital Assn.
Sami Butler, Mt. Nurses' Assn.
Susan Witte, Blue Cross/Blue Shield of Montana
Kristi Blazer, Mt. Addiction Service Providers and Children's Comprehensive Services

Opponents: Randy Bishop, Billings, trial lawyer
David Heuther, Custer
Al Smith, Mt. Trial Lawyers' Assn.

Opening Statement by Sponsor:

SEN. DUANE GRIMES, SD 20, Clancy, said the hospital communities use what is called peer review. That means that a whole bunch of doctors get a phone call and they say, would you come in and help us analyze this to see if we're doing things right or if we did things right in that case. Under the assumption that everything would be kept confidential, those doctors come in to a peer review panel, and they can be quite frank and quite open. This has a direct result of improving health care protocols and treatments. What would be quite onerous and is currently, is if you opened up those peer reviews and made them essentially matters of public record. If you do that, there's not one doctor that would go because they're not going to say something that could potentially implicate a colleague. On the other hand, there is information that should be available to the public, and that is information that is specific to the case. What should remain confidential is the brainstorming or the hypothetical discussion of a particular treatment, problem or issue that may have occurred. These are sometimes referred to as mortality and morbidity conferences, M and M conferences, just because they deal with those issues. We need to keep those confidential. There was a Supreme Court case that left quite a bit of confusion, and when you read it, you don't know what part of the information they're talking about as being confidential. The critical decision this committee needs to make is what needs to be confidential. Keep those peer reviews confidential and you keep the quality of health care up for everybody. If you open them up to everyone to go in and try to find stuff, it would create problems down the road and you'd have professionals who are unwilling to donate their time and effort and their professional judgment. When legislative caucuses were opened up, things changed forever. When you're in a public setting and you know things can be

used, you say things differently. There's a distinction here that's very important that needs to be made. ***{Tape : 1; Side : A; Approx. Time Counter : 0 - 4.2; Comments : Beginning of tape did not include all of the sponsor's opening.}***

Proponents' Testimony:

Pam Hanson, Holy Rosary Healthcare, Miles City, said she is also testifying on behalf of St. Vincent Healthcare and St. James Healthcare, all associated with Sisters of Charity of Leavenworth Health *System.* They strongly support the bill, and she presented written copies of her testimony. ***EXHIBIT(huh64a01){Tape : 1; Side : A; Approx. Time Counter : 5 - 8.4}***

Dr. Larry McEvoy, Deaconess Billings Clinic, presented written testimony in support of the bill. ***EXHIBIT(huh64a02){Tape : 1; Side : A; Approx. Time Counter : 8.4 - 13.7}***

Fritz Pierce, Billings, attorney, said he has practiced for the past 30 years in the field of health care law and defends doctors, hospitals, clinics and other health care professionals. Montana has had a peer review statute on the books for many years, and it was interpreted by the Montana Supreme Court in 1991 to say what we say it says. In June of 2000, the Supreme Court issued an opinion in a case where he was representing Holy Rosary Hospital in Miles City. While they paid lip service to saying and believing that peer review was a good thing, the way they wrote their opinion essentially destroyed Montana's peer review statute. The trial judge in this case, reading the Supreme Court's opinion, gave up all the records of the peer review committee wherever there was any reference to the patient, to the plaintiff's attorney. The Court essentially gutted the peer review statute and made it ineffective. Essentially litigants suing health care providers have complete access to all the facts and information they need. What they wouldn't get under this statute would be discussions by groups of doctors and nurses, long after the fact, of the very facts which are the basis of any claim for any patient care and treatment. In essence, they are being deprived of nothing. They are not being deprived of the facts that relate to the case, such as the medical records, witnesses, or anything that might help them in preparing their case against the health care providers. To not enact this statute would have a profound chilling effect on doctors and nurses discussing among themselves how to make health care better, and it will result in a decrease in the quality of health care to everyone in the state of Montana.***{Tape : 1; Side : A; Approx. Time Counter : 13.7 - 19.5}***

Jim Ahrens, President, Mt. Hospital Assn., encouraged the committee to pass the bill. There are close to 60 facilities in Montana, and

each one of them is to be engaged in this process. If you shut that down, it does have a chilling effect on what goes on within all those facilities. It's important that these discussions take place. ***EXHIBIT(huh64a03){Tape : 1; Side : A; Approx. Time Counter : 19.5 - 20.6}***

Sami Butler, Mt. Nurses' Assn., said this bill provides opportunities to perform quality management and also addresses errors in the system rather than assigning blame. It certainly is in keeping with their commitment to patient safety as well as self-regulation, and they ask for support of the bill.***{Tape : 1; Side : A; Approx. Time Counter : 20.6 - 21}***

Susan Witte, representing Blue Cross/Blue Shield of Montana and their physician partners, said they think it is a good bill and urge support.***{Tape : 1; Side : A; Approx. Time Counter : 21 - 21.8}***

Kristi Blazer, Mt. Addiction Service Providers and Children's Comprehensive Services, urged support of the bill.***{Tape : 1; Side : A; Approx. Time Counter : 21.8 - 22.6}***

Opponents' Testimony:

Randy Bishop, Billings, trial lawyer, has represented the family of David Huether for the past nine years. They lost their father, George Huether, as a result of medical negligence at Holy Rosary Hospital. He died on June 10, 1992, because he was left unattended in his hospital bed after successful conclusion of major surgery. No one in his family knew why he had died, but in a post-death meeting with hospital administration, the family was made to feel that they were inattentive to their father and made to feel guilty. They left with questions and did not know what happened, because the last they had heard, their father was doing well. Their father was left unattended, because the nursing staff was short; his vital signs were not taken at appropriate intervals; and the family didn't do anything wrong and had even gone to the nursing station to ask for help twice without success. An action was filed against the hospital, and after two years of litigation, it was suggested for the first time ever that there was an automatic blood pressure monitor and heart rate monitor on Mr. Huether at the time he died. There was not one single reference to this monitor in the patient's medical chart, his official hospital record. The lawyer who represented Holy Rosary Hospital before Mr. Pierce became involved never once suggested, either at the medical-legal panel hearing or in any formal response to discovery, that there was any such monitoring going on. Mr. Bishop set about to find out about the monitoring, and it occurred to him that if anyone had written up an incident report about this unusual occurrence, the death of someone who had successfully come through surgery, that they would surely

have mentioned a monitor, so he asked for the reports. That's what prompted this entire eruption that has generated this legislation. It was refused. There was a hearing before the district court judge and he refused it. The plain meaning of the statute was clear, and it is consistent with what this committee is being asked to do here and are being told that this legislation does, that is to separate facts from opinions and supervisory and disciplinary conclusions. He asked for the facts. It generated an appeal to the Mt. Supreme Court, and their opinion said the plain meaning of the statute is clear. A patient, and in the case of a death, the patient's family, is entitled to know what happened, to know facts. The facts were produced, one page, and it was perhaps the most inflammatory page, based on facts, that he has seen in 25 years of practicing law. The committee has been told that this bill preserves everything for patients and their families in terms of their access to knowing the truth about what happened. The bill redefines what data is discoverable, and it says specifically that incident reports are not discoverable; they are not data. Incident reports carry facts. Patients are entitled to facts. This bill cuts away the right to know why a loved one was injured or killed in a hospital. That is wrong. He distributed two exhibits relating to charting and explained that there is a huge difference between a patient's medical chart and a patient's medical facts. Hospital risk managers spend a great deal of time worrying about what you put in a patient chart. The Huether decision states that there should not be two sets of books in a hospital. He quoted the operative language from the decision, written by Chief Justice Turnage, "We conclude that the net effect of the peer review statutes is that health care information belongs to both the patient and the hospital, while data is a matter of internal administrative function. We conclude that all health care information either reviewed or generated by medical staff committees should be made available to the subject patient. Thus, for example, an incident report, including a retrospective report of what occurred in the course of a hospital patient's care and treatment, would be discoverable. Records of the discussion and recommendations of a peer review committee and the professional training, supervision or discipline as a result of such an incident or a report would not be discoverable." He took depositions in the Huether case of nurses who were the people in charge of making sure that George Huether was sufficiently recovered from anesthesia to be taken out of the recovery room and up to the floor. He asked what the level of consciousness was that she reported upon leaving the recovery room, and she answered that she had charted "patient does arouse easily...but may dose at intervals." He could see on the chart a check mark adjacent to the word "awake" with handwritten words next to it that said "but drowsy." He took those words to be true as there was nothing in the patient's records that said otherwise. Another nurse had seen Mr. Heuther in the elevator when he was being brought back from recovery, and he appeared to her to be "sleepy." Mr. Bishop had

asked her if Mr. Heuther was asleep, because he was not supposed to be asleep when he returned to the floor. The sworn testimony by the nurse was that she really didn't remember if he was asleep. After the Supreme Court decided the case, Mr. Bishop got a copy of an incident report relating to Mr. Huether on June 10, though it was prepared two months later, and the nurse who had testified that she didn't remember if he was asleep, had written that she had seen him in the elevator and he was very anesthetized and did rouse slightly, but while they were going down the hall to his room, "he was snoring loudly and in a deep sleep." This case settled.***EXHIBIT(huh64a04)EXHIBIT(huh64a05){Tape : 1; Side : A; Approx. Time Counter : 22.6 - 30}{Tape : 1; Side : B; Approx. Time Counter : 0 - 5.6}***

David Heuther, Custer, said that after his father, George Huether, passed away, he wrote to the doctor asking what had happened. The doctor referred that letter to the hospital. He and his brother met with the hospital representatives and left the meeting feeling that as a family, they were responsible for his death and they should have done something like supervised or watched him or pushed a button. They also went away with the feeling that he was a sick old man and maybe it was too costly to maintain his health care. They didn't get any answers, and all they really wanted to know was what had happened. This has haunted him for nine years and he still thinks about it but feels that the Supreme Court decision allowed some closure. He feels that anything done in secret, for whatever reason, will not be in the best interests of the patient or the citizens of Montana. If we have openness and honesty, we can find better health care for all patients. Passing a bill like this would restrict the truth and actually hinder medical care down the road.***{Tape : 1; Side : B; Approx. Time Counter : 5.6 - 8.6}***

Al Smith, Mt. Trial Lawyers' Assn., said they do not disagree with the witnesses who testified that peer review is necessary to protect those opinions. They just want to make sure that families get the facts. He distributed proposed amendments that he said would help to do that. He said they are not asking for opinions; they don't care about the opinions of peer review or what recommendations they make for changes in the hospital; they don't care about disciplinary matters, but they would like to know the facts. This bill with the Senate amendments sets up incident reports or occurrence reports. The problem with doing things by label is that it leaves open the possibility that facts will get hidden. The incident report in the Huether case was not provided in the normal course of discovery. It was only provided after the Supreme Court said you have to provide the facts that the peer review committee is reviewing, not their opinions but the facts. A Harvard Medical School study estimated that about two percent of the medical negligence that occurs in the US is ever brought to

suit. It's not like every time something goes wrong, people are out suing. Very often what we're talking about here is not so much the course of litigation, but a lot of times families just want to know what happened, what the facts were in the situation. ***EXHIBIT(huh64a06){Tape : 1; Side : B; Approx. Time Counter : 8.6 - 12.3}***

Questions from Committee Members and Responses:

Rep. Jent asked **Randy Bishop** where he found the factual information about the blood pressure monitor that was apparently key to this case. **Mr. Bishop** said the suggestion that there was such a monitor first arose during the course of the nurses' depositions. It was not in the patient chart or in any of the documentation. **Rep. Jent** asked if it is fair to say that the Heuther case involved a medical cover-up. **Mr. Bishop** said the Huether case and the Huether opinion, taken together, left him feeling like a wonderful thing had been accomplished, not only for the family but for all patients who receive health care, because the possibility of important factual information about the treatment that people receive in hospitals being covered up was greatly minimized.

Rep. Schmidt asked **Fritz Pierce** if he had seen the amendments and what he thought about them. **Mr. Pierce** said when you get to the phrase "information concerning" we're right back to the Huether decision, so it basically puts us right back where we were. It won't change anything and will basically make the statute the way it is now. He asked permission to comment on one thing Mr. Bishop had said, and was granted permission. He said this is utterly beyond belief and he is glad he has some documents with him today. He had a letter written by David Heuther to the hospital a month after his father's death, and in the letter he said, "The only monitor left on him, my father, was the blood pressure machine, and his nurse was only in the room every 15 minutes." Mr. Heuther knew there was a blood pressure monitor on his father. There was no cover-up; the family knew about the monitor the day they were there. When they got the peer review information, it said nothing about a monitor because they don't put that in the chart any more than they do a thermometer or a blood pressure cuff. The bill specifically says that incident reports are discoverable, so what Mr. Bishop is asking for today is in this bill. The present statute is ambiguous about whether or not incident reports are peer review, but they've wanted to clarify that.

Rep. Brown asked **Al Smith** the purpose of his amendment and what it actually does. **Mr. Smith** said in the bill it says "incident report" or "occurrence report" and they are trying to make clear with the first amendment that just because there is a label or something that says report, that's not all the patients are limited to, that

they get any "factual information concerning a patient's care, treatment or condition while at a health care facility." The second amendment makes clear that where it does try to define incident report, we're not trying to get access to opinions and things like that. **Rep. Brown** asked where the chart fits in here, with an incident report or an occurrence report, or is it completely different. **Mr. Smith** said it would be completely different. The chart is already a patient record that is available to the patient or the family.

Rep. Noennig said the bill clearly allows discovery of incident reports and occurrence reports, so he is guessing that the problem is the definition of incident report and occurrence report and wondered if he is correct in that. The issue becomes if there is factual information discussed in the context of the peer review, and that seems to be where the difference is. He asked **Mr. Smith** if his amendment would include discovery of statements made during a peer review session that pertained to facts relating to the case, whether they were produced as a report of the incident or whether they were subsequently discussed in the peer review session. Trying to determine which of those should be produced and which aren't seems to be what the opposition is objecting to, and he asked **Mr. Smith** how this can be clarified. **Mr. Smith** said it isn't that difficult, and he wished he would have brought one of the documents from the Huether case that was produced at the Supreme Court's order. The top half to three-quarters of the first page set out the facts, and the rest of it was an analysis of those facts. They would like to see what the facts are; they don't care about the analysis or what opinions are drawn from those facts. But if in the course of preparing for these peer reviews, there is a listing of facts, they would like to have those available so the patient or attorney can look at them. If it has to be redacted so that the opinions are taken out, that can be easily done; or if it's just a matter of taking one section of just facts, that can be done. **Rep. Noennig** said maybe the problem is partially created by what the bill does in line 17, amending the data that is discoverable, because it says "all reports." He asked about oral statements of fact that are combined with discussions or brainstorming, and how they would be separated out. **Mr. Smith** said he doesn't understand the oral report part himself and isn't sure how, unless it was a tape recording of the meeting and started out as a listing of the facts of the case. **Rep. Noennig** asked if you took a deposition of a doctor and asked him what he said about the case in the peer review session, wouldn't that be discoverable if it had facts in it under what the Supreme Court said and what the proposed amendment would do to the bill. **Mr. Smith** deferred the question to **Mr. Bishop**, who asked if he was struggling with the words "oral reports" as used in the definition of data and wondering how to segregate opinions from facts. **Rep. Noennig** said yes, and a broader

question is that the peer review sessions could include reports of facts combined with opinions, and he wondered how someone would distinguish which of the oral reports and written reports were discoverable and which weren't in order to protect the sanctity of the peer review sessions. **Mr. Bishop** said this is difficult. An example is the incident report that he had read to the committee, which was very factual based and should be produced right away, and it was produced after the Supreme Court decision. The report that raised the hackles of Holy Rosary Hospital and its counsel when it was produced was the one that contained analysis in addition to facts. Under this legislation, with the amendments attached, he would expect that portion of it to be redacted. The same thing would be true in taking the deposition of someone who participated in a peer review committee and there was an oral discussion. The questions would be what happened, what were the facts surrounding the treatment, what monitors were there. **Rep. Noennig** said he was trying to understand how the bill would work and his concern was that during the factual statements there could be admissions during a peer review, and those would be admissible, but should they be admissible if they are said in a peer review context. **Mr. Bishop** said they should be. The word admission means to him a statement of fact made by an employee of a hospital and they should be discoverable. ***EXHIBIT(huh64a07)***

Mr. Bishop said it is the obligation of counsel to prepare a witness to understand the difference between facts and opinions. **Rep. Noennig** asked **Fritz Pierce** what he thought about the propriety of admitting into evidence a statement of fact from the peer review sessions. **Mr. Pierce** disagreed with Mr. Bishop. He said there is a report in the Heuther case that the hospital had requested of an anesthesiologist who reviewed the entire case for the hospital to see if they did anything wrong or could improve their care. There was no redacting of fact from opinion by the trial judge. It is marked confidential and is a peer review document, but based on the Huether decision, the judge felt compelled to produce the entire document, factual statements and opinions. **Rep. Noennig** asked **Mr. Pierce** if the district court were doing its job and the amendments proposed by Mr. Smith were adopted and only factual statements could be admitted, did he think that would be appropriate and should factual statements be admissible if they could be so determined. **Mr. Pierce** thought they would still have the same chilling effect on the peer review process. The same people could be interviewed and deposed. Peer review would be harmed greatly. Plaintiffs' access to facts will not be harmed if there is peer review confidentiality. **Rep. Noennig** said that the terms peer review, quality assurance and quality improvement committee aren't defined in the bill and he wondered how far that would stretch back to a couple of doctors talking in the hallway about the incident. In an informal discussion, would the protection still prevail in a

situation like that where a statement was made about the facts that was overhead, and would it be subject to deposition. **Mr. Pierce** said it would be subject to each individual case. **Rep. Noennig** asked how other states deal with this problem and is this bill similar to what they do. **Mr. Pierce** said the bill is very similar to other states' statutes. ***EXHIBIT(huh64a08)***

Rep. Shockley asked **Mr. Pierce** if he thought we have a right to believe that judges will follow the law and if the district judge in this case didn't, there would have been an appellate remedy. **Mr. Pierce** said he thought the judge did follow the law under the Supreme Court opinion. He thinks the Supreme Court has defined it too broadly and it encompasses everything.

Rep. Facey asked **Dr. McEvoy** if he had seen different forms of incident reports at the different hospitals where he'd worked. **Dr. McEvoy** said they are fairly standard. **Rep. Facey** asked if the health care community ought to change the forms and include a place on the reports for facts and another part for opinions. **Dr. McEvoy** said that in a review they look at the existing facts and evaluate processes, but they don't create new facts.

Rep. Newman said that under current law, peer review data is not admissible, and he asked **Mr. Pierce** what public policy would be served by making this information non-discoverable. Mr. Pierce said under the *Huether* decision, every peer review document that refers to a patient is now discoverable so the statute, in his opinion, is basically non-existent at this point. **Rep. Newman** asked what important public policy would be served by making that information non-discoverable. **Mr. Pierce** said it will allow health care providers to discuss difficult issues relating to their peers' treatments of their patients and allow them to be critical of each other and self-critical of themselves, to work out ways of treating patients better, to provide better procedures for patient care, and to try and raise the level of patient care for every Montanan without fear that whatever reports they make and whatever discussions are put down on paper are going to be put before a judge. **Rep. Newman** asked **Mr. Bishop** what important public policy will be served by making sure that this kind of information is discoverable. **Mr. Bishop** said from his perspective the public policy is the constitutional right to know, the right of access to the courts and the right of due process. You can't get due process without knowing what the truth is. The public policy that would be served by amending the bill is to make it clear that factual information belongs to the patient or the surviving members of that patient's family just like it does to the hospital.

Rep. Raser asked **Mr. Bishop** if having public access to the facts but possibly reducing the number of facts available outweighs the benefit that we could get from peer review. **Mr. Bishop** said that periods of transition are difficult, and we are in a period of transition right now between a rule which shielded facts from discovery and one which makes such facts available. That's the effect of the *Huether* decision. He believes that we can trust the district courts to separate these things out and that we can trust physicians, nurses and hospital administrators to do the right thing. **Rep. Raser** asked why we can't trust people to give information when the court asks for it and there are legal means to obtain it. **Mr. Bishop** said he believes that in almost every instance, people who are placed under oath tell the whole truth. The *Huether* case created what the health care industry sees as a blockbuster decision, because the facts in that case were highly unusual. In medical cases, they try to analyze patients' charts to find out everything they can. If there is something in writing that is a specific reference to a fact, they pursue and explore that. That helps them to ask the right questions during discovery.

Rep. Jent asked **Mr. Bishop** about 50-16-205 regarding data that is confidential and inadmissable in judicial proceedings. **Rep. Jent** asked **Mr. Bishop** to explain the critical difference between some of the terms used, including admissible and discoverable. **Mr. Bishop** said admissible means it can be admitted into evidence so the jury can see it, and discoverable is a much broader term. All facts and information is discoverable which is either relevant to the case or which can lead to the discovery of admissible evidence.

Rep. Shockley asked **Mr. Pierce** if it would quiet his fears about documents that mixed facts and opinion if the statute said "documents that are mixed facts and opinion will be redacted." **Mr. Pierce** said if he'd only been practicing law a year or two he might agree with that, but as a practical matter, he thinks it won't work very well. All the facts are in the patient charts and the incident reports, so there is no reason for anyone to get facts from peer review. **Rep. Shockley** asked if the incident report that they were discussing was discoverable under the old statute. **Mr. Pierce** said it was questionable under the way the present statute is written. Under the bill that is before the committee, it is clearly discoverable. ***{Tape : 1; Side : B; Approx. Time Counter : 12.3 - 30}{Tape : 2; Side : A; Approx. Time Counter : 0 - 30.}***

Closing by Sponsor:

Sen. Grimes said he wanted to rise on a point of personal privilege and that is that he takes strong exceptions to the defamatory

statements that he believe are disingenuous to this committee made by Mr. Bishop. He asks that the committee consider the slanderous statements as they try to decide the truthfulness of this situation. The trauma protocols in Montana began to show higher fatalities in response to emergencies, and he assumed most of those were traffic accidents. Because of peer review, they reviewed these in a very open forum and changed some things. As a direct result, people have been spared and rates have dropped. That is a direct result of peer review. Another example is handling people with diabetes in Montana. Practitioners and others noticed statistics and came together in a peer review format to openly discuss how things should be handled, and things changed. If a situation affected our family members, we would appreciate the professionalism and the effort that is put forth in peer review meetings. The amendments gut peer review and go back to the problem this bill is trying to solve in the first place. The policy issue before the committee is whether information should be kept confidential when it is two professionals who we depend on for the medical safety in our communities, and if we allow them the freedom to discuss amongst themselves what went wrong. The facts that they'll be referring to are the same ones that will be discoverable. The incident reports will be the same incident reports that are discoverable if anybody wants to have a cause of action. What the committee does here has an incredible impact on the future quality of health care in Montana.***{Tape : 2; Side : B; Approx. Time Counter : 4.4 - 10.4}***

HEARING ON SB 288

Sponsor: SEN. CHRIS CHRISTIAENS, SD 23, Great Falls

Proponents: Susan Good, Allied Citizens for Health Care Equity
Ed Eaton, AARP
Evelyn Havskjold, Dir., Hill County Area 10 Agency on Aging
John Hine, Mt. Primary Care Assn.
Rose Hughes, Ex. Dir., Mt. Health Care Assn.
Amy Sheen, Helena
Betty Beverly, Ex. Dir., Mt. Sr. Citizens' Assn.
Sami Butler, Mt. Nurses' Assn.
Jim Smith, Mt. Pharmacy Assn.

Opponents: None

Opening Statement by Sponsor:

SEN. CHRIS CHRISTIAENS, SD 23, Great Falls, said that HB 188 requires the Board of Pharmacy to create a program whereby they will be able to donate prescription drugs by long-term care facilities to provisional community pharmacies. He distributed an amendment that changes "shall" to "may" so it will not mandate that every long-term care facility in the state do this, because some of them may be in locations where the distance and the difficulties that would entail would make it not feasible. ***EXHIBIT(huh64a10)Tape : 2; Side : B; Approx. Time Counter : 10.4 - 11.9***

Proponents' Testimony:

Susan Good, Allied Citizens for Health Care Equity, said this is a patient advocacy group concerned mainly about managed care in Montana. It is a crime against humanity that in a day and age when drugs are so expensive, because of a vagary in the law, an inordinate amount of drugs from nursing homes for patients who are deceased or for whom that particular drug didn't work, are literally flushed down the toilet. According to some studies by the AMA, they estimate that between four to ten percent of prescribed drugs are disposed of. Another study showed 6.7 percent, so that would be right in the ball park. In this day and age of ever-increasing drug prices, this is a situation that needs to be rectified. One of the questions asked of her during the Senate hearing that she couldn't answer was how many states do anything similar. The answer is that 38 states do this right now.***{Tape : 2; Side : B; Approx. Time Counter : 11 - 13.6}***

Ed Eaton, AARP, said they support anything that can be done to reduce medical costs for seniors and needy citizens and would appreciate consideration of this bill.***{Tape : 2; Side : B; Approx. Time Counter : 13.6 - 14.1}***

Evelyn Havskjold, Dir., Hill County Area 10 Agency on Aging, said her agency does Medicaid eligibility, and the majority of their seniors who are being forced into that is because of the high cost of medical care and they are living longer and have higher expenses. She distributed a sample bill for one senior, showing **the** high costs of the prescription drugs. That person is now on different medications, so those drugs would be destroyed, according to the fax that is a part of the exhibit. Drugs come in enclosed blister packs so they are not handled by other persons, so they are perfectly legal and acceptable to be given to other low-income persons. Perhaps that will help them maintain their dignity, and they won't have to go through the complicated Medicaid process. She also submitted a letter of support from a Havre registered nurse.

EXHIBIT(huh64a11)EXHIBIT(huh64a12)*{Tape : 2; Side : B; Approx. Time Counter : 14.1 - 18.5}*

John Hine, Mt. Primary Care Assn., said he is here on behalf of the federally qualified health centers in Montana, who are in total support of this bill.***{Tape : 2; Side : B; Approx. Time Counter : 18.5 - 19.5}***

Rose Hughes, Ex. Dir., Mt. Health Care Assn., representing nursing homes throughout the state, said they think it is shameful to flush drugs down the toilet. If it is possible that these drugs can be used by other people, they think it is very appropriate. They are aware that other states have programs like this one. All of their facilities would be very happy to work with the Board of Pharmacy and with the community pharmacies to try to make implementation of this bill a reality.***{Tape : 2; Side : B; Approx. Time Counter : 19.5 - 22}***

Amy Sheen, Helena, Dir. of Nursing at a long-term care facility, said she can't tell the committee how many thousands of dollars she either sends back to the pharmacy in medications or sends home with patients or their families when patients no longer need a medication or they have expired. Every month they clean out their med rooms, and she cannot tell the committee the number of medications that are being flushed down toilets and the amount of money. She sees another side of this when family members come into the facility and tell her that an individual hasn't been on a particular medication, simply because they could not afford this medication when they were at home. Either through spend-down and getting qualified for Medicaid, they now have the luxury of having this medication, but she thinks it is just a crime that these people, while in the community, did not have access to these medications that would have kept them as productive people and citizens of the community longer. She supports the bill.***{Tape : 2; Side : B; Approx. Time Counter : 22 - 23.8}***

Betty Beverly, Ex. Dir., Mt. Sr. Citizens' Assn., said that prescription drugs is a hot topic, and we have talked about it over this election year and how people are choosing between prescription drugs and heat and food. Seniors are on fixed incomes. Fixed means they can't do anything about it. So this bill is really needed. Her mother passed away on the 6th of the month and had already got her prescriptions that totaled over $250, and they were flushed down the toilet. All of us really need to look at the cost of prescription drugs, and any way that we can save them and help someone that qualifies for this drug, needs the drug and cannot afford to pay for it. She hopes the committee will pass the bill.***{Tape : 2; Side : B; Approx. Time Counter : 23.8 - 25}***

Sami Butler, Mt. Nurses' Assn., said they strongly support this bill. They see it as a reasonable and sensible approach to provide an outlet for unused drugs that are still very usable.***{Tape : 2; Side : B; Approx. Time Counter : 25 - 25.9}***

Jim Smith, Mt. Pharmacy Assn., said energy prices kind of pushed prescription drug prices off the front pages starting about October, and he was kind of glad to see the energy prices do that. Had that not happened, we'd have had a lot more prescription drug bills this session. By 2003 health care costs and prescription drug costs will be right back in front of the legislature and on the front page. It is important that we do something that we can in this session. The concepts that are coming forward are worthy of serious consideration, and this bill is too. In all honesty, we are getting into a very complex area. The reason that some drugs are flushed down the toilet is to protect the safety of other people. As we go into this, we're going to be talking about the Food and Drug Administration, and then the Medicare policies and guidelines. It's going to get complex and difficult to implement this program, and he thinks a lot of it is going to have to be left up to the rule making authority of the Board of Pharmacy. His association is willing to sit down with the Board of Pharmacy and try to craft good rules and do so through an open public process, working with senior citizens, long-term care facilities and others with a genuine interest in working our way through the state and federal regulations and making some of these unused drugs available to low-income individuals.***{Tape : 2; Side : B; Approx. Time Counter : 25.9 - 27.2}***

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

Rep. Brown asked the sponsor if a person who wants to get these drugs would still need a prescription. **Sen. Christiaens** said yes.

Rep. Thomas asked Rebecca Deschamps, Ex. Dir. of the Board of Pharmacy, for her opinion of drugs that are in bottles rather than in blister packs. Ms. Deschamps said that her opinion would be the same as the FDA holds if a drug is involved. The FDA traditionally has not allowed this. They've drawn a hard line. They came out less than a year ago in response to some urging from physicians, she believes in Oklahoma, and said they could see this up to a point; if it's original packaging, unit dose packaging from the manufacturer, it will be OK. Those come with each little tablet or capsule labeled as to what it is, the strength, lot number,

expiration date. They specifically turned thumbs down on the type of blister pack, unfortunately, you saw. Most of those are heat sealed, and drugs are fragile creatures. Once you heat seal something, there's quite a bit of evidence that you've already done it a little damage, and the FDA has said it's OK that way for a year, but they're still, she thinks, looking at methods, ways to allow these to be recycled. She thinks that they agree that it would be a useful thing, but at the moment, they've said you cannot recycle any controlled substances, those would be narcotics; you cannot recycle things that are in the pharmacy-done blister packs, and you cannot recycle bulks. When you get a vial back in the pharmacy, you can't speak to the fact where those tablets have been. At least if they're still sealed, you know that it's still a sanitary condition. **Rep. Thomas** asked Ms. Deschamps if types of packaging is addressed in the bill. Ms. Deschamps said it is not in there to allow it to be put into board rule. The board would have no latitude to do anything that the FDA has already forbidden it to do. Their only option at the moment would be to set up a program and to have it be manufacturers' unit dose only.

Rep. Shockley asked Ms. Deschamps what kinds of drugs they would be able to recycle, in her opinion. He was referring to the packaging rather than the type of drug. Ms. Deschamps said she should have brought some samples. Manufacturer unit doses come straight from the manufacturer already in a dose, so all of the required FDA tests as far as stability, temperature, how they are affected by moisture, that type of thing, have already been done. The ones they get in hospitals are usually either in cards of 25, numbered, or in a strip of 25. That is the type of thing, as opposed to the heat-sealed blister pack. **Rep. Shockley** asked if bottled medicines can be recycled if the patient dies. Ms. Deschamps said they cannot. That isn't presently allowed under law, and she does not foresee that the board is going to say that bulk items are exceptions to this. **Rep. Shockley** asked if the federal government would allow this. Ms. Deschamps said they would not. As the folks charged with making the rules, the Board of Pharmacy can certainly not overstep the FDA in its wisdom.***{Tape : 2; Side : B; Approx. Time Counter : 27.2 - 30}{Tape : 3; Side : A; Approx. Time Counter : 0 - 6.2}***

Closing by Sponsor:

Sen Christiaens said this bill is just a small step toward answering some of the needs that are out in our communities, and he would urge their support. **Rep. Raser** will carry the bill.***{Tape : 3; Side : A; Approx. Time Counter : 6.2 - 7}***

EXECUTIVE ACTION ON SB 288

Motion/Vote: REP. SHOCKLEY moved that **SB 288 BE CONCURRED IN.** Motion carried 17-1 with Whitaker voting no.

Motion/Vote: REP. SHOCKLEY moved to **RECONSIDER ACTION ON SB 288. Motion carried unanimously.*{Tape : 3; Side : A; Approx. Time Counter : 7 - 8.5}***

Motion/Vote: REP. LEE moved that SB 288 BE AMENDED. Motion carried 17-1 with Whitaker voting no.***{Tape : 3; Side : A; Approx. Time Counter : 8.5 - 9.2}***

Motion/Vote: REP. THOMAS moved that SB 288 **BE CONCURRED IN AS AMENDED.** Motion carried 17-1 with Whitaker voting no.***{Tape : 3; Side : A; Approx. Time Counter : 9.2 - 10}***

HEARING ON SB 324

Sponsor: SEN. DAN HARRINGTON, SD 19, Butte

Proponents: Kristi Blazer, Mt. Addiction Service Providers

Opponents: *None*

Opening Statement by Sponsor:

SEN. DAN HARRINGTON, SD 19, Butte, said this is a very simple bill. It is intended to care for an unintended effect which occurred as a result of a committee in 1995 trying to avoid an unintended effect. This bill is intended to put back what was mistakenly removed. The bill deals with the medical-legal panel and the health care providers and facilities are subject to this procedure. It has been in existence since 1977. Licensed chemical dependency centers provide health care as part of their treatment process. From the beginning of the panel process, these facilities were included and the claims against them were required to go through the process. Like all other participants, the licensed c.d. facilities were sent a bill to pay for the cost of the process. They paid it. In 1995, HB 301 removed them from the program. Copies of the committee minutes were submitted to show how the mistake was made. HB 301 was a cleanup bill, intended to consolidate some licensing activities and define certain services. Jerry Loendorf, lobbyist for the Mt. Medical Assn., had expressed the opinion that the bill would have an unintended effect of amending the definition section of law dealing with the Montana medical-legal panel, resulting in sending four additional groups a bill for the assessment of the fee. Licensed chemical dependency facilities had previously been included in this and had paid their assessments since 1977. We

learned in 1997 when the claim was brought, that such facilities had been unincluded and this claim was not required to go through the panel process. He is bringing this bill because licensed c.d. facilities found it of benefit to be part of the screening process. They are within the health care facility licensure law and want to be put back into that law. Page 1, lines 27 and 28 of the bill show where they were stricken, and they should never have been put in that section as it took them out of the panel. All this bill does is to remove them again and to make them part of the panel.**EXHIBIT(huh64a13)** ***{Tape : 3; Side : A; Approx. Time Counter : 10 - 11.9}***

Proponents' Testimony:

Kristi Blazer, Mt. Addiction Service Providers, said in this bill she is only representing eight of those providers, the in-patient facilities that offer a full range of medical care and 24 hours worth of service. Her clients found it to be of benefit when they were included within the panel provisions. In fact, there were three lawsuits between 1978 and 1995, when they were removed, that were dismissed by the claimant before they ever became lawsuits. The medical-legal panel is designed to weed out frivolous lawsuits, and, therefore, that reduces the cost of health care. Her clients simply want to be put back in. They never wanted to be left out. They are glad to pay the assessments. She submitted written testimony in support of the bill from Mona Sumner, Chief Operations Officer of Rimrock Foundation, which is one of the eight affected facilities. **EXHIBIT(huh64a14)** ***{Tape : 3; Side : A; Approx. Time Counter : 11.9 - 13.4}***

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

Rep. Noennig asked the sponsor if he had understood correctly that the chemical dependency facilities were mistakenly removed from the jurisdiction of the medical-legal screening panel and now they want to be back in. Sen. Harrington said that is right. Rep. Noennig asked why they want to be back in. Ms. Blazer said between 1995 and just before this session, there was a lawsuit filed against Rimrock Foundation, and they thought they would be going through the medical-legal panel. All of a sudden they realized that they had been taken out, so they did some legislative history research and found that the inadvertent testimony by Mr. Loendorf had taken them out, so they now have asked to be put back in, which is the purpose of this bill. **Rep. Noennig** asked how someone could be mistakenly excluded when the language says "does not include a chemical

dependency center." Ms. Blazer said the legislative history indicates that this was a cleanup bill, a consolidation of some licensing activities, so they were trying to decide how to redefine a facility that is licensed by the state. Mr. Loendorf, she thinks without asking any of these groups, suggested that the way that they were now going to redefine health care facility would end up having the unintended effect of including the four additional groups that are on line 28 of this bill, and he hadn't asked those groups. She assumes that the other three groups had never been a part of the panel and now do not want to be. He didn't specifically ask the chemical dependency facilities whether they'd been a part before, and they had been since the inception of the medical-legal panel program. **Rep. Noennig** asked if the mistake was that the bill was amended without asking the people who were involved in it. Ms. Blazer said that is correct.***{Tape : 3; Side : A; Approx. Time Counter : 13.4 - 15}***

Closing by Sponsor:

Sen. Harrington said the bill is quite self-explanatory, and he thanked the committee for their time.***{Tape : 3; Side : A; Approx. Time Counter : 15. - 15.3}***

EXECUTIVE ACTION ON SB 324

Motion/Vote: REP. JENT moved that **SB 324 BE CONCURRED IN.** Motion carried unanimously. **Rep. Cyr** will carry the bill.***{Tape : 3; Side : A; Approx. Time Counter : 15.3 - 16.1}***

HEARING ON SB 459

Sponsor: SEN. EVE FRANKLIN, SD 21, Great Falls

Proponents: John Connor, Mt. County Attorneys' Assn.
Sharon Howard, Great Falls, Health Services Dir. & Chief Medical Officer, Cascade County Adult Detention Center
Kathy McGowan, Ex. Dir., Mt. Council of Community Mental Health Centers
Sami Butler, Mt. Nurses' Assn.
Jani McCall, Deaconess Billings Clinic & Mt. Assn. of Homes & Services for Children

Opponents: None

Opening Statement by Sponsor:

SEN. EVE FRANKLIN, SD 21, Great Falls, said this is another advanced practice registered nurse bill. The scope of practice of nursing in Title 37 allows for certain functions. There are places in statute where the law has not caught up with the scope of practice. She is a clinical specialist in nursing and has done some work at the Cascade County regional jail, and in that process has seen how patients are really limited in getting the mental health treatment that they need. They may be in jail but not court adjudicated, they may be mentally ill and need to get to treatment, and there's the issue of fitness to proceed. In the statute, there are only two areas of practice that can do that right now, and they want to add advanced practice registered nurses to that group of people. The reason gets back to the basic access to care issue. They have been in situations in that setting and probably other settings have similar experiences where it is simply difficult to find an individual who can do the work appropriately. A psychiatrist or psychologist is able to do it, and there are instances when someone with the appropriate training who's also an APRN can also determine fitness to proceed. The definition of fitness to proceed is in statute, and for the psychiatric professional the straightforward criteria is, does this person have a mental defect? Does the defect constitute a DSM IV diagnosis? That's the diagnostic and statistical manual, which she calls the cookbook of psychiatric diagnoses. If the person has a mental defect and if it constitutes a DSM IV diagnosis, mostly important for fitness to proceed is whether the diagnosis and mental defect is of such severity that it is interfering with the individual's right to understand their charges and participate in their defense. This is really a clinical psychiatric decision that is made, and APRNs who have the clinical specialty in psychiatry are well able to make that determination. Again, the motivation for this piece of legislation is to allow people to have the appropriate triage and decision about where they need to get to if they come to a jail setting; do they need to be in jail or do they need to be in treatment, and to expedite that decision appropriately.
EXHIBIT*(huh64a15)*
{Tape : 3; Side : A; Approx. Time Counter : 16.1 - 21.2}
Proponents' Testimony:

John Connor, Mt. County Attorneys' Assn., is a prosecutor with the Attorney General's office. MCAA supports this bill. There is a lot of writing here, as required by legislative rules, for a relatively small change, but it's one that is of some significance to the kind of practice that they do. Sen. Franklin had spent a fair amount of time talking with county attorneys about this and the implications of it for the kinds of cases that they prosecute. They have come to the conclusion that this is a very good idea. It will expedite situations, particularly in cases where the defendant is being held

in custody and there is some question about his or her competence to proceed. Rather than wait around to find a psychiatrist or psychologist who can come and make that determination by interview, if there is a qualified psychiatric nurse available to do it, that makes it easier to come to that conclusion early on for the benefit of all of the parties and everyone is better served. In the long run, it will save money because there would be more access and probably less cost when we're talking about the people making *those* kinds of assessments. He wouldn't presume to speak for the defense, but his wife, who is chief public defender, thought it would be great, for the same reasons that the prosecution does. It would just make easier access when somebody is available, which benefits both sides. He encourages support of the bill.***{Tape : 3; Side : A; Approx. Time Counter : 21.2 - 23.2}***

Sharon Howard, Great Falls, Health Services Dir. & Chief Medical Officer, Cascade County Adult Detention Center, submitted written testimony in support of the bill.***{Tape : 3; Side : A; Approx. Time Counter : 23.2 - 24}***

Kathy McGowan, Ex. Dir., Mt. Council of Community Mental Health Centers, said community mental health centers highly value the APRNs that they are able to hire and would very much support this bill. Especially in the rural areas, if they can hire these nurses and use them in a lot of different settings, they really value them and don't want to let them go once they get them, really recognizing that they are priceless. This would be one more way that they could use them and that the system could use them. They very much support the bill.***{Tape : 3; Side : A; Approx. Time Counter : 24 - 24.5}***

Sami Butler, Mt. Nurses' Assn., said the committee had previously heard her testimony regarding psych APRNs, and MNA strongly supports this bill.***{Tape : 3; Side : A; Approx. Time Counter : 24.5 - 25}***

Jani McCall, Deaconess Billings Clinic and Mt. Assn. of Homes and Services for Children, said they strongly support the bill. It makes sense in terms of service and care for individuals. If you want to look at quality, access, cost effectiveness, this bill does this. Montana is huge geographically but it has a very small population. It is very difficult to find professionals, particularly out in the rural areas, and this bill addresses this. It's an absolutely good thing to do, and she urges support.**EXHIBIT(huh64a16)*{Tape : 3; Side : A; Approx. Time Counter : 25. - 25.7}***

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

Rep. Jent asked Sami Butler if APRNs are allowed to give a diagnosis as part of their duties, basically a DSM IV diagnosis of mental disease and defect. Ms. Butler said they are. **Rep. Jent** asked if APRNs are allowed to prescribe psychotropic medications without a doctor looking over her shoulder. Ms. Butler said they can.

Rep. Facey said he couldn't write fast enough and asked the sponsor what else she said after "fitness to proceed, a person has to have a mental defect and does the defect fit into DSM IV definition." Sen. Franklin said the rest was, is it of such severity that they cannot understand their charges or cooperate with their defense. Rep. Facey asked if those three cases were anywhere in the bill. Sen. Franklin said she thinks it is in a different place in statute. It's not in this bill. The whole issue of fitness to proceed issues are dealt with in a different part of statute. She said there also is the issue of intent, can they form intent, and that has come up in some other arenas. With fitness to proceed, sometimes that isn't always dealt with initially, but that's another issue as well. That is almost retroactive to the actual crime that was committed, and oftentimes that is not actually done in fitness to proceed, so it's a little more limited.

Rep. Dell asked Sami Butler if this is something that other surrounding states are doing. Ms. Butler said she doesn't have that information but would get it for the committee. Sen. Franklin said she isn't sure what the surrounding states are doing and whether or not they have taken this step. Rep. Dell asked if this was just something that they thought would make the system work a little bit quicker. **Sen. Franklin** said it is really very pragmatically oriented. This was a way to make sure people got the care they needed, and has come out of some real experiences where they saw that they could expedite care and could have made the determination more quickly if they had been able to use personnel that were available.

Rep. Noennig asked the sponsor if this was the third bill related to APRNS and if she could explain what each of the bills were doing. Sen. Franklin said the bills are linked. Her task, following Legislative Finance Committee and HJR 35, was to go through statute and try to find the places in law where the statute hadn't kept up with scope of practice. SB 108 allowed APRNs to explictly in law function at the State Hospital and act as professional persons. SB 290, which actually was independent and came from the Mt. Nurses'

Assn., allowed APRNs to sign death certificates. The last bill is this bill, SB 459. Rep. Noennig asked Sen. Franklin is she is an APRN and she said she is. She considers these bills to be "patient relief" bills, because APRNs see that the work needs to be done, they know how to do it, they are ready to do it, and scope of practice suggests that they should do it, but they can't do it because statutorily it is explicitly not stated. ***{Tape : 3; Side : A; Approx. Time Counter : 25.7 - 30}{Tape : 3; Side : B; Approx. Time Counter : 0 - 3.7}***

Closing by Sponsor:

Sen. Franklin said the issue is clear. She thanked the committee for their indulgence and hoped that they could support the bill.***{Tape : 3; Side : B; Approx. Time Counter : 3.7 - 4.7}***

EXECUTIVE ACTION ON SB 459

Motion/Vote*:* **REP. ESP** moved that **SB 459 BE CONCURRED IN.** Motion carried 17-1 with Jent voting no. **Rep. Newman** will carry the bill.***{Tape : 3; Side : B; Approx. Time Counter : 4.7 - 5.7}***

HEARING ON SB 476

Sponsor: SEN. BOB KEENAN, SD 38, Bigfork

Proponents: Rose Hughes, Ex. Dir., Mt. Health Care Assn.
Judy Peterson, Dir., Extended Care Services, MHA
Denzel Davis, Admin., Quality Assurance Division, DPHHS
Connie Hallock, Glasgow, Valley View Nursing Home
Amy Sheen, R.N.
Nancy Driver, Helena, Admin., Rocky Mountain Care Center

Opponents: None

Opening Statement by Sponsor*:*

SEN. BOB KEENAN, SD 38, Bigfork, said there is an amendment to SB 476 to change a date to give the department more time. In nursing homes, generally there are two major problems: Medicaid rates are too low and the regulatory climate is time-consuming, costly, and frustrating for staff and also for the residents and their families. This bill is a first step to try to address those problems. It has some rulemaking authority in it, which was a

concern of his, but given the support they had in the Senate hearings and from the department, and the fact that the nursing home industry recognizes the need for this and feels like it is a good cooperative step towards rulemaking, if the nursing homes don't mind, he's fine with it too. Sections 1 and 2 are basically designed to deal with an oversight in current statute. Montana's nursing homes must be in compliance with state and federal laws, regulations, and the words "and policies" are currently used. We're removing the "and policies" because it's not appropriate for the state to require compliance with anything that isn't statutory or regulatory. Nursing homes have a right to know what's expected of them, so we're simply taking out the words "and policies," whatever that could possibly mean. Section 3 is aimed at helping nursing homes deal with three specific issues in their regulatory environment. The bill requires DPHHS to adopt rules. There is a lack of definitions currently for important terms used in the survey process. The survey process is the inspection process. Because these terms are not defined, nursing homes don't know what to expect, and there's a great deal of inconsistency in the process from one facility to the next. Without definition, these terms mean whatever the individual surveyors or the surveys say they mean on any given day, and this needs to be tightened up. The second allows for an informal dispute resolution process. The federal government requires this to enable nursing homes to question deficiencies they think are written in error. The third part of this section regards physicians' orders. There are more and more cases where state *surveyors are* questioning the orders of the attending physician, particularly with respect to medications, but also in other areas. Sometimes the person questioning physicians' orders is a nurse, sometimes a dietician; it varies. Facilities are in the middle, and they have no choice but to follow the attending physician's orders, but when the surveyors disagree, the facility gets a deficiency. In each of these three circumstances, this legislation simply requires the department to work with providers and consumers on these issues, and then adopt rules defining the terms being used, defining a fair and objective dispute resolution process and defining how disputes between surveyors and physicians will be resolved. In Montana we have some darn good nursing homes, but when CNN reports some kind of a calamity in a nursing home in Texas, the national government reacts and they send out new rules and regulations nationwide that impact and further constrain and drive the costs up in our nursing homes. Medicaid rates are too low for nursing homes. In Montana, the legislature has recognized that there is a problem, and we are inching our way towards a better cooperative environment between government and nursing homes.***{Tape : 3; Side : B; Approx. Time Counter : 5.7 - 11}***

Proponents' Testimony:

Rose Hughes, Ex. Dir., Mt. Health Care Assn., presented written testimony in support of the bill. It is unusual for a group to request rule-making authority, but it is important in this arena that the nursing homes know what is expected and that there be consistency. The three areas the sponsor talked about are the areas where there is inconsistency, unsureness and dispute, and they would like those issues resolved. They feel comfortable that they can work with the department in the rule-making process. **EXHIBIT(huh64a17)** ***{Tape : 3; Side : B; Approx. Time Counter : 11 - 13.1}***

Judy Peterson, Dir., Extended Care Services, MHA (the former Mt. Hospital Assn.), presented written testimony in support of the bill.**EXHIBIT(huh64a18)** ***{Tape : 3; Side : B; Approx. Time Counter : 13.1 - 14.6}***

Denzel Davis, Admin., Quality Assurance Division, DPHHS, said the department supports this bill.***{Tape : 3; Side : B; Approx. Time Counter : 14.6 - 14.9}***

Connie Hallock, Glasgow, Valley View Nursing Home, said she supports the bill, which would provide a clear definition and consistency in the survey process of long-term care. The regulations have many vague definitions. Several things they would like to see clarified would be issues of what is clinically unavoidable, what is the standard of long-term care for appropriate treatment as stated in the regulations, what is the definition of adequate, and what are the parameters of clinically appropriate. It is an industry where they have surveyors with their own interpretations of what the regulations are, which override that of the professional, be it the physician, the physical therapist, the dietician. Now the process basically leaves it up to the surveyor to decide what is appropriate for the plan of care.***{Tape : 3; Side : B; Approx. Time Counter : 14.9 - 16.9}***

Amy Sheen, R.N., said she is a registered nurse at a long-term care facility in Montana and is representing eleven other long-term care facilities that are in support of this bill. They have run into difficulties during surveys, not knowing what the expectation is. They would like consistent rules and definitions among all the surveys. ***{Tape : 3; Side : B; Approx. Time Counter : 16.9 - 18.3}***

Nancy Driver, Helena, Admin., Rocky Mountain Care Center, said she supports the bill.***{Tape : 3; Side : B; Approx. Time Counter : 18.3 - 18.9}***

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

Rep. Esp asked the sponsor if the inconsistent rules they're having trouble with are state or federal rules. **Sen. Keenan** deferred to Ms. Hughes, who said it is interpretations. Individual inspectors come into the buildings and do different things because the federal survey process describes in some ways in generalities what is expected. For example, key terms listed in the bill, such as "actual harm," have no definition for what that is, so it's whatever the individual surveyor comes in and says it is on a given day. She thinks it is possible to define those terms or at least to set some parameters for what that means. Most of the regulatory arena of the nursing facilities is in fact federal, but they leave holes and it isn't untypical for states to fill those holes.***{Tape : 3; Side : B; Approx. Time Counter : 18.9 - 20.7}***

Closing by Sponsor:

Sen. Keenan thanked the committee and closed. ***{Tape : 3; Side : B; Approx. Time Counter : 20.7 - 20.9}***

EXECUTIVE ACTION ON SB 476

Acting Chairperson Schmidt said there is a proposed amendment to the bill. On page 2, line 21, it changes the date the rules have to be adopted from 2002 to 2003.

Motion: REP. ESP moved that **SB 476 BE CONCURRED IN.**

Motion/Vote: REP. ESP made a motion that **SB 476 BE AMENDED.** motion carried unanimously.

Motion/Vote: REP. BROWN moved that **SB 476 BE CONCURRED IN AS AMENDED.** Motion carried unanimously. **Rep. Schrumpf** will carry the bill.***{Tape : 3; Side : B; Approx. Time Counter : 20.9 - 22.2}***

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EXECUTIVE ACTION ON SB 361

Motion/Vote: REP. BROWN moved that **SB 361 BE CONCURRED IN.** After an explanation of what the bill does and limited discussion, the question was called. Motion carried unanimously. **Rep. Sliter** will carry the bill.***{Tape : 3; Side : B; Approx. Time Counter : 22.2 - 30}{Tape : 4; Side : A; Approx. Time Counter : 0 - 4.6}***

EXECUTIVE ACTION ON SB 290

Motion/Vote: **REP. JENT** moved that SB 290 BE CONCURRED IN. Motion carried unanimously. **Rep. Facey** will carry the bill.***{Tape : 4; Side : A; Approx. Time Counter : 4.6 - 5.8}***

EXECUTIVE ACTION ON SB 477

Motion: **REP. JENT** moved that **SB 477 BE CONCURRED IN.**

Discussion: **Rep. Jent** said that this is the nursing home bed rail bill, and deals with restraints in nursing homes and state regulation in that area. He had asked a question about the concept of preemption of state lawmaking and had received a memo from Anita Rossman. What preemption is is basically if we're preempted by what the federal government does, that, in plain English, means we're out. We can't mess with it. The question is whether we're preempted from making this sort of a law about nursing homes. The memo discussed the Montana Supreme Court's view of preemption and said that there's three ways you can be preempted. You can have the law expressly do it, or the federal law may occupy the entire legal field and state law may conflict. We already know in this bill that there is a provision where it may conflict, because it basically says if you do this and you do that, that you're deemed not to violate the federal regulations. The first and the second express preemption and Congressional intent. The federal regulation that the bill seeks to supplement is 42 CFR 48313A, which is basically a regulation and enacted under the federal statute. That statute basically is one giving nursing facility residents maximum liberty from "physical or chemical restraints imposed for purposes of discipline, convenience and not required to treat medical symptoms," and it goes on to talk about you can only have restraints for the physical safety of the residents or upon written order of a physician. And that's what the controversy was in our bill, because you have to have the written order of the physician, or should somebody else do that. Because the federal law specifically addresses restraint use, this memo indicates Congressional intent to "occupy the field." The federal statute goes on to say that nursing facilities must operate and provide services in compliance with all applicable federal, state and local laws and regulations and with such other requirements relating to the health, safety and well being of residents and related to the physical facilities thereof as the Secretary (of Health and Human Services) may find necessary. Those regulations are under another federal code provision, 42 USC 1395H, that he didn't read to the committee. What's he's getting at is that all these federal rules and regulations amount to Congressional preemption of the standards

for nursing services paid with Medicare and Medicaid dollars. He believes and the committee heard witnesses talking about if you don't comply with the restraint regulations that you not only get cited and fined but maybe even lose your funding. He is afraid that if we jump in there as a state and give well-intentioned people the idea that they can do things in this way, we may well end up jeopardizing the very facilities that we intend to assist. He doesn't think we can enact state laws that conflict with federal regulations, or can enact laws at all in the area of restraints in nursing homes when the federal government has occupied the field by a comprehensive statutory scheme in the US code and a regulatory scheme in the Code of Federal Regulations. Preemption means we can't go there.

Rep. Shockley said he had read the memo. He had been told that there is an opposite side to this, and the committee would be getting some information on it. He doesn't think it is conclusive yet and would like to make sure the committee gets both sides of the argument.

Substitute Motion/Vote: **REP. THOMAS** moved to **POSTPONE ACTION ON SB 477. Motion carried unanimously.** ***EXHIBIT(huh64a09) {Tape : 4; Side : A; Approx. Time Counter : 5.8 - 12}***

EXECUTIVE ACTION ON SB 181

Motion: **REP. BROWN** moved that **SB 181 BE CONCURRED IN.**

Discussion: **Rep. Dell** said he had decided not to submit an amendment to add "profits" to non-profits, but he didn't want it to look like he wanted to be part of the bill. He has a bit of a reservation with non-profits, because he thinks they've become much more than the original intent of the non-profit philosophy of years ago. He'll pick that bone another day with another bill and not go there with this bill. Rep. Noennig had discussed this matter with Senator Cobb, and his opinion was that profit corporations were covered because on line 21 it says "including non-profit corporations," and the purpose in writing the bill was just to make sure they were included. He assumed that profit corporations were included and gave the example of the 50- megawatt facility on the second page of the bill which he didn't think could ever be done by a non-profit corporation. Question was called.

Motion/Vote: **REP. BROWN** moved that **SB 181 BE CONCURRED IN.** *Motion* carried unanimously. **Rep. Raser** will carry the bill. ***{Tape : 4; Side : A; Approx. Time Counter : 12 - 16}***

ADJOURNMENT

Adjournment: 7:15 P.M.

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REP. BILL THOMAS, Chairman

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PATI O'REILLY, Secretary

BT/PO

EXHIBIT(huh64aad)