

MINUTES

MONTANA SENATE 59th LEGISLATURE - REGULAR SESSION

COMMITTEE ON PUBLIC HEALTH, WELFARE AND SAFETY

Call to Order: By **CHAIRMAN BRENT R. CROMLEY**, on April 1, 2005 at 3:15 P.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Brent R. Cromley, Chairman (D)
Sen. John Esp (R)
Sen. Duane Grimes (R)
Sen. Lynda Moss (D)
Sen. Jerry O'Neil (R)
Sen. Trudi Schmidt (D)
Sen. Dan Weinberg (D)

Members Excused: Sen. John Cobb (R)
Sen. Carol Williams (D)

Members Absent: None.

Staff Present: Rita Tenneson, Committee Secretary
David Niss, Legislative Branch

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

Committee Business Summary:

Hearing & Date Posted: HB 704, 3/30/2005; HB 740,
3/30/2005; HB 336, 3/30/2005
Executive Action: HB 740; HB 60; HB 336

HEARING ON HB 704**Opening Statement by Sponsor:**

REP. JONATHAN WINDY BOY (D), HD 32, opened the hearing on **HB 704**, Time requirements for certain DPHHS actions involving long-term care facilities.

REP. WINDY BOY, told the Committee the bill makes sure some of the reporting requirements on dispute resolutions with Department of Public Health and Human Services (DPHHS) and long term care facilities, around the State, are made clear.

Proponents' Testimony:

Rose Hughes, Executive Director, Montana Health Care Association, representing nursing homes throughout the State of Montana, read her testimony. She gave the Committee copies of letters the Department sends to facilities, explaining the serious implications connected to the deficiencies. She said there was an issue in the House, regarding the fiscal note. The Department requested four staff to meet the deadlines. There is language in the bill saying the intent is this be funded within the department budget. The survey process makes the facilities accountable and protects the residents. She said the inspectors should also be accountable and meet deadlines, not putting the facilities at risk. She presented a letter from an administrator of a facility going through the process as part of her testimony.

[EXHIBIT \(phs69a01\)](#)

[EXHIBIT \(phs69a02\)](#)

[EXHIBIT \(phs69a03\)](#)

Pat Melby, Montana Health Care Association, said he has done some 15 to 20 Informal Dispute Resolutions, (IDRs), on behalf of long term care facilities. The adverse impact on the facilities, under the 2567 deficiency is tremendous. The facility has an extremely short time frame in which they must submit a plan of correction to a 2567. There is no leeway in submitting this plan of correction. The 2567 has to be posted in the long term care facility with all the deficiencies, even if they are trivial. It is then posted on the CMS's website where people, looking for long term care for their loved ones, will see it. The facility's insurance company is going to ask for the 2567 and make a determination on insurance rates. The Board of Nursing Homes is treating 2567s as complaints and taking disciplinary action on the nursing home administrator's license. In more grievous cases there are civil monetary penalties imposed by CMS (Centers for Medicaid and Medicare Services). Payments are withheld for new

admissions to the facility and sometimes payments are cut off all together. With these extreme measures, there is an appeal mechanism where the facility can appeal through DPHHS to an administrative law judge who works for the Social Security Administration. It can take a long time to get this through the process. Where civil monetary penalties are not imposed or reimbursement for new admissions is denied, there is no appeal. The only thing left for the facility, in wrongfully determined deficiencies on the 2567, is the independent dispute process. This involves the exchange of some documents and a two-hour informal conference. This should not take 130 days for a decision from the deciding officer. No additional research is necessary in this process. He said, when he looked at the fiscal note where the department said they needed 45 days to provide these decisions, he was shocked.

Casey Blumenthal, Montana Hospital Association, and nursing homes across the State. The 2567 form displayed in the facilities and on the website, lists the number of deficiencies, the name and some are relatively minor. There are such things as a dietary deficiency for lumps in sugar, a handle loose on a drawer, crumbs under the toaster. There are more important things, but there are lists and lists of very minor things which look bad in number. People see the tag title and probably never read the list, but they form an opinion regarding the nursing home from this. She said these things should be cleaned up as soon as possible. A new form cannot be posted on the web site until the entire process is done, so the old one sits there forever and looks like the current one. It could be a year or more old. When the facility gets the form from the department, the department has ten working days to send it out. The facility has only ten calendar days to get it back and they better not be late.

Opponents' Testimony:

Mary Dalton, Quality Assurance Division, DPHHS, has responsibility for both the informal dispute resolution (IDR) and the Medicare, Medicaid Survey and Certification (MSC) processes addressed in **HB 704**. She read her testimony. The white handout is a copy of an IDR hearing decision. IDR time frames that are being added are on page 2, lines 2-4 of the bill). The handout on colored paper is the actual survey form, called a 2567. She said the IDR hearings can be complex and take much longer than two hours. Very few are in the two hour time frame. The white handout, the informal dispute resolution, talks about the tags and outlines the seriousness of the deficiency. Then it goes through each example in the IDR. It is time consuming and requires research, which may require looking at federal and state

regulations, as well as nursing home industry and medical standards of practice. If it involves a drug, such as the handout involves, you will see by reading the handout, the extensive research. Regarding the survey form (2567), we have 90 plus nursing facilities in the State of Montana, the department performs 418 surveys in a year. On page 8, of this handout, is a quality of care issue where there was serious smoking deficiencies. The ten days we are talking about, is not the time to do the survey. It is a time the department is allowed, after the surveyors come in, to write the survey and put it out. The department takes this very seriously because this is the first form that gets posted for the nursing home. It needs to be as perfect as they can make it before it is sent out. If it isn't right, they will not send it out until it is.

[EXHIBIT \(phs69a04\)](#)

[EXHIBIT \(phs69a05\)](#)

[EXHIBIT \(phs69a06\)](#)

{Tape: 1; Side: A; Approx. Time Counter: 0 - 30.9}

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. CROMLEY asked **Mr. Melby** to explain the surveys. **Mr. Melby** told him there is an annual and a complaint survey. **SEN. CROMLEY** asked about the annual survey. **Mr. Melby** explained the annual survey is done by the department. The surveyors go to their office and have ten days to review the findings they have. Based on those findings, they will apply the rules which are voluminous. The rules guidelines are even more voluminous for the surveyors.

SEN. CROMLEY asked **Ms. Hughes** if the bill puts into State law what is already in federal guidelines, regarding the ten days. **SEN. CROMLEY** asked if, in the past, in her opinion has there been a problem getting the report back to the facility in the ten days. **Ms. Hughes** answered there have been some problems getting the reports back. **SEN. CROMLEY** said then, the report goes back to the facility and, if they find something amiss, how does this bill come into play. **Ms. Hughes** told him when the facility receives the 2567, they have ten calendar days in which to file a plan of correction. If they disagree with any of the deficiencies, they are to notify the department and request an informal dispute resolution. That is the second deadline contained in the bill. This is the one that says, once the hearing is complete, there should be a decision rendered within 45 days. **SEN. CROMLEY** asked if there was a federal guideline for

this. **Ms. Hughes** answered this is required by the feds. **SEN. CROMLEY** asked if there was a time limit for the completion process. **Ms. Hughes** told him there was no time limit for the completion of the dispute process. The process, in terms of asking for it and a date set, has State regulations that set time frames for the nursing home to present information, in writing, to the department. Then it sets a date set for the hearing. From the time they ask for it and the time they have the hearing, it could be anywhere from four to six weeks. It depends upon the amount of information needed. **SEN. CROMLEY** asked about the 45 day time frame until the process is complete. He said there are ten days for the department to report to the facility, ten days for the facility to appeal, then a period of time that may take three or four months for the IDR to take place. **Ms. Hughes** told him, when the process is complete, they want a decision 45 days after the hearing. If that is not clear, she added they would consider it a friendly change to make it clear the review process is complete after the hearing. They are looking for a decision 45 days after that hearing.

SEN. GRIMES asked **Mr. Melby** to comment. **Mr. Melby** said, 45 days are from the time the matter is submitted. It would be a meeting of both sides. **SEN. GRIMES** asked when they could take the postings off the wall and the web site. **Mr. Melby** told him only if the recommendation of the presiding officer found there were no deficiencies and the department agreed to withdraw the 2567.

SEN. GRIMES asked how many surveyors there were around the State. **Ms. Dalton** answered there are 24 surveyors. They have a 10 to 15% vacancy at any given time. **SEN. GRIMES** wanted to know who the surveyors notified. **Ms. Dalton** told him the 2567, pink form, is sent out. The information on the left is from the department, the right is from the facility. This is the plan of correction the facility must do. There are two ten-day working periods now. The facility has ten days to do a plan of correction and request an IDR. The minimum time a hearing can be set is 21 days, depending upon scheduling difficulties, which may be four or five weeks. Then the hearing officer hears the dispute between the two parties. The department presents their side, the facility presents theirs. Prior to this, the department requires both sides to submit their documentation in writing.

SEN. GRIMES commented, we have 418 surveys done a year, there are 24 surveyors and one hearings officer. **Ms. Dalton** told him there were 60 hearings last year. **SEN. GRIMES** was having trouble reconciling that with the estimates in the fiscal note she presented. **Ms. Dalton** said the fiscal note is zero right now. On page 2, line 1, the language passed by the 2001 legislature, says it has to be heard by an individual who is independent of

the survey process and who can evaluate the legal sufficiency of the findings of the surveyor. The words, evaluate the legal sufficiency are why it goes beyond the dispute. The hearing officer looks at what the law says, what the medical standards are and what the practices are at the time.

{Tape: 1; Side: B; Approx. Time Counter: 0 - 29.4}

SEN. GRIMES then questioned the second part of the technical note, page three, where it says the bill will result in a loss of \$200,000 federal revenue per year.

{Tape: 1; Side: B; Approx. Time Counter: 29.4 - 30}

Ms. Dalton thought it an incorrect statement, unless **Ms. Hughes** had information on it. **Ms. Hughes** said, as she read the revised fiscal note, it said \$29,000.00 a year of State funds would be put in. They would draw down \$200,000 in federal match to pay for these positions. The House put language in saying we are not going to fund this. Her understanding of the fiscal note was the budget office is saying the \$200,000, in match that would have come if you hired these positions and did the original fiscal note, will no longer come. She wasn't sure she agreed, but they are saying if we have the staff, we will get the federal funds. If we don't have the staff, we won't get the federal funds.

{Tape: 2; Side: A; Approx. Time Counter: 0 - 1.8}

SEN. CROMLEY, again, was trying to get the time process down. He said there is the ten day time after the survey. The facility has ten days to plan for correction or make the appeal. How much time is in the rules that elapses before the submission date.

Ms. Dalton, from memory, said the 10 days from the end of the survey, another ten days which will put you out about 20 to 24 days from the end of the survey because some are working days, some are calendar. The hearing officer will receive the request for the hearing and she will set the time frame no shorter than 21 days. **SEN. CROMLEY** asked if this could be as much as three months, if the department needed the time. **Ms. Dalton** said the department has one chance to reset the date. Now we are at about eight weeks from when the IDR happens.

SEN. MOSS asked how many times, during the past year, with the 418 surveys and the 60 surveys, was this process lengthened to the unhappiness of the nursing homes. **Ms. Dalton** answered the IDR process is taking on average right now, 135 days. It is not only the unhappiness of the nursing homes, it is also the unhappiness of her surveyors. **SEN. MOSS** had a question about the 24 surveyors and the 20% vacancy. She asked if they could be

missing several staff people who could help expedite this. **Ms. Dalton** replied, not with the IDR process. That person has to be independent of the survey process and has different training.

SEN. O'NEIL asked **Ms. Hughes** what would happen if the word, legal, was removed on line 1 page 2. **Ms. Hughes** said the reason the word, "legal sufficiency," is in there to determine if they did or did not have compliance with the law.

Closing by Sponsor:

REP. WINDY BOY thanked the Committee for a good hearing on a simple bill. He said if it has to be amended, it is up to the Committee. He said this was brought forward as an accountability bill and is not the fault of either party, but we have an obligation to make sure the federal law is being held in conformity.

SEN. GRIMES will carry the bill on the Senate floor.

HEARING ON HB 740

{Tape: 2; Side: A; Approx. Time Counter: 1.8 - 21.7}

Opening Statement by Sponsor:

REP. RALPH HEINERT (R), HD 1, opened the hearing on **HB 740**, Appropriate money for asbestos-disease related programs.

This bill addresses people with asbestos exposure. It is a grant request for \$175,000 to allow the Lincoln County Health Board to continue to assist individuals with health issues primarily related to asbestos related respiratory problems. The program this grant will help fund is called the Asbestos Related Disease Network, (ARDNET). Services provided by ARDNET are separate from the services presently provided by the Center for Asbestos Related Diseases.

{Tape: 2; Side: A; Approx. Time Counter: 21.7 - 28.4}

Tracy Velazquez, Evaluator for ARDNET, read her testimony.

EXHIBIT (phs69a07)

{Tape: 2; Side: A; Approx. Time Counter: 28.4 - 30}

{Tape: 2; Side: B; Approx. Time Counter: 0 - 8.6}

SEN. AUBYN CURTISS, SD 1, FORTUNE told the Committee they have appealed to the congressional delegation for assistance in providing funding for the research and treatment center. It is desperately needed for people who are ill and have no other means of redress. There is a bill in the U.S. Senate for funding. She commended the people in their efforts to treat the people who need it. They are compiling a valuable database for the research of asbestosis. A lot of the asbestosis symptoms do not manifest themselves for as long as 20 years. She added that the work being done will save the State of Montana millions of dollars in the future.

{Tape: 2; Side: B; Approx. Time Counter: 8.6 - 10.6}

Don Judge, Teamsters Local 190, rose in strong support of the legislation. He said the program may become a model nationwide as they begin to explore the impacts that happened. The W. R. Grace facility, in Libby, during the 50s, 60s, 70s, and early 80s produced about 80% of the world's vermiculite. It has been used, up to the early 90s, as one of the key products for insulation. As many as 15 to 35 million homes, in America, have been insulated with vermiculite that came from Libby, Montana. The vermiculite, from Libby, was shipped to more than 750 sites in North America and dozens of sites overseas. They sent the material to these sites, then heated it up in an extreme form in order to create what is called "popping" of this material. This expanded it to become an insulating material. As a result of that, studies done in sites in Texas, Wisconsin and elsewhere in the country are discovering a number of individuals have died, or are dying, have developed asbestos, mesothelioma and other problems related to contact with this material. In 1999 legislation was first introduced, at a federal level, to create an asbestosis settlement system. Asbestosis and asbestos, in terms of related problems, is a huge thing in the country. There are literally hundreds of thousands of lawsuits existing.

Mr. Judge continued by saying that what is unique about Montana and tremalite asbestos, is that it was not covered under the same occupational safety and health standards because they hadn't taken a look at tremalite as they had looked at other forms of asbestos. Having done that now, they have discovered that it is probably the most toxic form of asbestos that exists, because of the tiny size of the fibers. One good gulp of tremalite asbestos related air can cause problems twenty years down the road. W. R. Grace did their own study. In one to five years, 10 to 15% of their workers developed asbestosis related problems. As they worked up to 20 years at the mill, it became 95% of the workers. Tremalite asbestos is the only case in the world where exposure to asbestos wasn't directly related to the work site.

Individuals who never worked at the plant, in Libby, who never had a family member work at the plant in Libby, but simply lived in the community were developing asbestosis related problems. He said the importance of this legislation relates to one other significant incident, of recent past, which will cause people to look at how to deal with massive tremalite asbestos-related problems in the very near future. It is 9/11. The twin towers were insulated with asbestos vermiculite from Libby, Montana. At times, there were air flyovers of the twin towers, following the collapse. The asbestosis fibers in the air and the dust, in New York City, were greater than they had been monitored over Libby, Montana at times when they were trying to determine how much asbestos exposure had taken place in Libby. A minimum of a hundred thousand workers, who worked to clean up that site, and countless more New Yorkers were exposed to tremalite asbestos produced in Libby, Montana. At some point, ten or fifteen years down the road, they will be dealing with the problems we have had in Libby, Montana. They will be looking to see what kind of model was created to help those individuals deal with this. In Libby, Montana, entire families have been diagnosed. Children who had played in the ball fields, ran on the track because it was lined with this stuff, or played in piles of this stuff that were next to the popping plants in Libby. Some brought this home with them in terms of dust on their clothes. Vermiculite, from Libby, was used in Scotts Turf Builder. In 1999, in Libby, 20 people had died, and approximately 200 had been diagnosed with asbestos related diseases. Today the death toll is over 200, and approaching 2000 people who have been diagnosed. This will go on for years and probably decades. It is a serious problem, and small amount of money. This can serve as a great example on how to deal with this in communities across the country, and maybe across the world that may end up dealing with this poison produced in one of the most beautiful places in Montana. He encouraged a do pass recommendation.

Al Smith, Montana Trial Lawyers Association, rose in support, saying it would be nice if the party responsible for the illness in Libby, W. R. Grace, could be held accountable financially and morally for what happened, but they can't. They used bankruptcy to escape their financial responsibility. This has left us, the taxpayers, to help folks out. They support the bill because it is the right thing to do. It is Montanans helping Montanans. It's a program that works and, with the small amount of money being asked for today, it will help continue a program that works in the future. He urged support.

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses: None.

Closing by Sponsor:

REP. HEINERT said there are about 1200 people diagnosed with asbestosis today. The number actually receiving insurance benefits through the W. R. Grace plan is between 500 and 800. There are a lot of people not working at the mine site that have been impacted. Tremalite asbestos may have a latency period of 20 to 40 years before these people actually are impacted with the problems. Medical professionals say, sometime in the future, we could be adding between 300 and 500 people a year who have developed asbestos related respiratory problems. As far as this being a one-time request, they are hopeful Congress we will give the help we need. ARDNET will be able to take over assistance for the community, when the funding comes through. He urged the Committee to concur.

SEN. CURTISS will carry the bill on the Senate floor.

HEARING ON HB 336

{Tape: 2; Side: B; Approx. Time Counter: 10.6 - 25.6}

Opening Statement by Sponsor:

REP. MICHAEL LANGE (R), HD 55, opened the hearing on **HB 336**, Revise developmental disability services.

REP. LANGE'S testimony is attached as an exhibit.

EXHIBIT(phs69a08)

{Tape: 2; Side: B; Approx. Time Counter: 25.6 - 30.6}

{Tape: 3; Side: A; Approx. Time Counter: 0 - 5.6}

Proponents' Testimony: None.

Opponents' Testimony: None.

Informational Testimony:

Bob Runkle, made himself available for questions pertaining to the bill as it affects public education.

Questions from Committee Members and Responses:

SEN. O'NEIL asked **REP. LANGE**, in new section 2, dual eligibility for services, what would happen if that section wasn't in the bill. **REP. LANGE** answered it is situation where a person is qualified and eligible. This falls back to the waiting list and lack of care. If they are getting some services, because of a disability, and medicaid could give a little more help, it would take some of the burden off the other fund. By doing this, they were doing what should have been done all along. The person shouldn't have been denied services in one area just because they were getting it in another. **SEN. O'NEIL** wondered if this would be double dipping, where they would get paid twice for the same thing. **REP. LANGE** answered, according to what the department told him, absolutely not. It's a matter of a loophole in the law. **SEN. O'NEIL** asked if they were getting benefits under this bill and getting Medicaid benefits, can we cut them off Montana benefits if we pass the new section 2. **REP. LANGE** said there two ways that could happen. If they are under 18, the benefits they would get would be an entitlement. After they are 18, they are no longer under an entitlement for DD services, it is on an availability level. It tied in with the financial assistance language and it gave them more flexibility to make sure if they couldn't get full funding, because there wasn't room in the program or they didn't have a program, this might be an option to get them some help. He didn't want to disqualify them from medicaid help simply because they got a little help somewhere else.

Closing by Sponsor:

REP. LANGE said Montana was sued a while back. It was called the Travis D. case. It was a lawsuit saying an individual was eligible to get some help and the State denied them. It set a precedent for the DD service issue. Title 53 spells out if you are eligible for these services in the State, nowhere in that section of law, or anywhere else, does it say the State can deny you service and give it to someone else. If you meet the qualifications, you are eligible to get help. For years the State has given help to some people, the adults, and not given it to others. Someone is going to be denied care and they are going to win the case because the State has not given them help when they have given it to someone else. In order to avoid the State paying out millions of dollars in legal fees and lawsuit filings to settle something we can do ourselves, we should give them the tool of financial assistance. If they can't give them a full program of help, they can give them some help.

EXECUTIVE ACTION ON HB 740

{Tape: 3; Side: A; Approx. Time Counter: 5.6 - 18.5}

Motion/Vote: SEN. MOSS moved that HB 740 BE CONCURRED IN. Motion carried unanimously by voice vote. SEN. GRIMES, SEN. SCHMIDT, SEN. WILLIAMS, SEN. WEINBERG voted aye by proxy.

SEN. CURTISS will carry the bill on the Senate floor.

EXECUTIVE ACTION ON HB 60

{Tape: 3; Side: A; Approx. Time Counter: 18.5 - 20.3}

SEN. CROMLEY said the parties met after the hearing on the meth cleanup bill and came up with language in amendment HB006003.adn.

EXHIBIT (phs69a09)

{Tape: 3; Side: A; Approx. Time Counter: 20.3 - 30}

{Tape: 3; Side: B; Approx. Time Counter: 0 - 11.6}

SEN. O'NEIL said if he understands the amendment correctly, when somebody is selling property that has been cleaned up, they don't have to notify the purchaser. If they do notify the purchaser that it has been cleaned up, they are immune from being sued for any damages caused by any residues that are left. Mr. Niss answered that it was basically correct, but an owner isn't required to give notice. He is still required, by sub section 1, to give notice if there has been no remediation. SEN. O'NEIL asked if the notice has to be given in the buy sell agreement or will it be given in an agreement at the time of the closing. Mr. Niss said it is not specified in the bill. They made it general in nature and it now says only two things. It has to occur in writing and it has to occur before the transaction.

{Tape: 3; Side: B; Approx. Time Counter: 11.6 - 16.4}

Motion/Vote: SEN. CROMLEY moved that AMENDMENT HB00603.adn BE ADOPTED. Motion carried unanimously.

Motion/Vote: SEN. CROMLEY moved that HB 60 BE CONCURRED IN AS AMENDED. Motion carried unanimously.

SEN. GRIMES will carry the bill on the Senate floor.

EXECUTIVE ACTION ON HB 336

Motion/Vote: SEN. MOSS moved that HB 336 BE CONCURRED IN. Motion carried unanimously. SEN. WEINBERG, SEN. GRIMES, SEN. WILLIAMS, and SEN. SCHMIDT voted aye by proxy.

SEN. CROMLEY will carry the bill on the Senate floor.

DISCUSSION ON HB 704

SEN. MOSS thought miscommunication was happening. The process wasn't happening in a timely fashion. She didn't feel either side answered Committee questions very well.

SEN. O'NEIL said it was a good bill, but it should be amended to say when the 45 days begin.

SEN. CROMLEY agreed. He said there wasn't a title for the person who is having the hearing. Ms. Dalton called her the presiding officer, but the title isn't in the bill. Without it in there, it is difficult to refer to this person.

SEN. MOSS suggested getting a copy of the administrative rules that oversee this program. SEN. O'NEIL agreed.

SEN. CROMLEY suggested calling the person the hearing examiner, for reference. He said, if they have rules, they must call that person something. With a designation date, at that point everything has to be submitted. There shouldn't be a problem getting a decision out 45 days after that.

SEN. CROMLEY said the hearing examiner would set the submission date, then the decision comes out 45 days later, as he understood it.

The Committee will review HB 704 again on Monday when they have more information.

{Tape: 3; Side: B; Approx. Time Counter: 16.4 - 30}

ADJOURNMENT

Adjournment: 6:05 P.M.

SEN. BRENT R. CROMLEY, Chairman

RITA TENNESON, Secretary

BC/rt

Additional Exhibits:

EXHIBIT ([phs69aad0.PDF](#))