

BEFORE THE BOARD OF PRIVATE ALTERNATIVE ADOLESCENT
RESIDENTIAL OR OUTDOOR PROGRAMS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT AND
ARM 24.181.301 definitions,) ADOPTION
24.181.402 fees, and the adoption of)
NEW RULES I through XL pertaining)
to private alternative adolescent)
residential and outdoor programs)

TO: All Concerned Persons

1. On March 12, 2009, the Board of Private Alternative Adolescent Residential or Outdoor Programs (board) published MAR Notice No. 24-181-3 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 303 of the 2009 Montana Administrative Register, issue no. 5.

2. On April 3, 2009, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Several comments were received by the April 10, 2009, deadline.

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

COMMENT 1: Two commenters suggested the board change "expectations" to "goals" in New Rule I.

RESPONSE 1: The board considered the comments but concluded the word "expectations" clearly demonstrates the intent of the board. The board is adopting the rule exactly as proposed.

COMMENT 2: One commenter objected to the provision in New Rule II that allows program participants unrestricted telephone access to report abuse. The commenter asserted it would be unworkable due to cultural differences among participants as to the meaning of child abuse under our country's laws.

RESPONSE 2: The board considered the comment and is amending the rule to allow participants timely access to report child abuse via the Montana hotline.

COMMENT 3: A commenter asked if the FBI cooperates with the fingerprinting and/or criminal background investigation required in New Rule III and whether there is a process in place to ensure this cooperation.

RESPONSE 3: The board interpreted the comment as a request for information and not a suggestion for a rule revision. Prior board discussions reflect that the FBI does cooperate with the fingerprinting and/or criminal background investigation.

COMMENT 4: Two commenters suggested the board amend New Rule IV to specify that a person posing a potential threat includes someone awaiting trial on the charges specifically listed in (2)(b).

RESPONSE 4: The board agreed with the comment and is amending the rule accordingly.

COMMENT 5: One commenter suggested the definition in New Rule IV of "posing a potential threat" include persons against whom child abuse or neglect claims have been substantiated.

RESPONSE 5: The board considered the comment and determined that both the individual fact situation and the substantiation process to address the situation are different from considerations for the safety and care of program participants in residential or outdoor programs. The board concluded that the language of the proposed rule fully addresses the matter.

COMMENT 6: Three commenters suggested the board amend New Rule VI to specify that training on passive physical restraint is required only if the program intends to utilize physical restraint as a method of behavioral management.

RESPONSE 6: The board concluded that the comments referred to situations where staff did not intend to use passive restraint. The board concluded that the proposed rule adequately addresses these situations and is not amending the rule further.

COMMENT 7: A commenter stated New Rule VIII was awkwardly worded.

RESPONSE 7: The board agreed with the comment and is amending the rule accordingly.

COMMENT 8: Two commenters suggested that the term "treatment planning" be deleted from the title of New Rule IX because not all programs provide treatment.

RESPONSE 8: The board agreed with the suggestion and is amending the rule's title accordingly.

COMMENT 9: Three commenters suggested that "personnel" be changed to "procedures" in (2)(f) of New Rule X for accuracy and clarity.

RESPONSE 9: The board agreed and is amending the rule accordingly.

COMMENT 10: Three commenters stated that the title of New Rule XI is not clear whether the rule refers to policy for the discharge and transfer of participants or program employees.

RESPONSE 10: The board notes that the rule applies to program participants and is amending the title accordingly.

Comments 11-16 apply to New Rule XII:

COMMENT 11: Several commenters stated the rule is not clear and requested the board define or set the standard for what the board means by "least restrictive method" of behavioral management.

RESPONSE 11: The board determined that the term is meant to be descriptive only and that the restriction is intended to be the least amount necessary. The board decided not to further define the term. Following consideration of numerous comments and suggestions on this rule, the board is amending New Rule XII to address concerns and clarify the board's intent regarding behavioral management.

COMMENT 12: Commenters requested clarification on the prohibition in (3)(k) against placing program participants in a locked room. Commenters asked if it meant a program can only put a participant in a locked room for therapeutic reasons, and suggested the board delete "for nontherapeutic purposes" from the rule.

RESPONSE 12: The board concluded that the commenters' interpretation is not consistent with the intent of the entire rule. Following consideration of numerous comments and suggestions on this rule, the board is amending New Rule XII to address concerns and clarify the board's intent regarding behavioral management.

COMMENT 13: One commenter pointed out that there are many passive physical restraint methods and suggested the board not list any specific methods. The commenter also asked the board to define "short term intervention."

RESPONSE 13: The board concluded that the specific methods were provided only as examples and that the rule is intended to focus on proper staff training. Following consideration of numerous comments and suggestions on this rule, the board is amending New Rule XII to address concerns and clarify the board's intent regarding behavioral management.

COMMENT 14: Two commenters suggested the rule require programs to describe the discipline methods used. The commenters also stated that corporal punishment is not effective, medication should not be used as a form of punishment, and program participants should not be forced to take an uncomfortable position for an extended period of time.

RESPONSE 14: Following consideration of numerous comments and suggestions on this rule, the board is amending New Rule XII to address concerns and clarify the board's intent regarding behavioral management.

COMMENT 15: Two commenters stated that students should never be denied visits or communication with their parents/guardians, program standards should include a written contract between the program and parents/guardians, and each program should have a written communications policy. The commenters further stated that participants should never be confined to a locked room, youth should never be used as disciplinarians for other youth, and that if a program intends to use restraint for behavioral management, the program should only use passive physical restraint in compliance with federal regulations.

RESPONSE 15: The board concluded that disciplinary processes are already addressed in program policy statements. Following consideration of numerous comments and suggestions on this rule, the board is amending New Rule XII to address concerns and clarify the board's intent regarding behavioral management.

COMMENT 16: Two commentators suggested new rule language for New Rule XII.

RESPONSE 16: Following discussion of other comments at the April 2009 meeting, the board considered the substitute language. The board compared the proposed rule with the suggested new language and determined that the commenters' rule better captures the board's concerns and intent and is set forth in a clearer, more easily readable format. The board is amending New Rule XII accordingly.

During the May 2009 meeting, board counsel addressed a citation to the Code of Federal Regulation contained in the commenters' rule. Counsel advised that this reference does not contain standards on passive physical restraint and should be stricken. The board is amending New Rule XII accordingly.

COMMENT 17: One commenter was disappointed that the rules do not include an occupancy standard and square footage requirements to limit overcrowding of kids.

RESPONSE 17: The board discussed these issues previously and concluded that they are adequately addressed in regulations of the Department of Public Health and Human Services and Department of Labor Building Codes.

COMMENT 18: Two commenters requested clarification on New Rule XV. One commenter asked if an initial prescription by program staff would also require notification of parents. A second commenter pointed out that physicians usually discuss initiation or change in medication with parents of a participant before the prescription is written, not later.

RESPONSE 18: The board discussed the comments and concluded that they were an observation on physician practice, rather than a suggested change. The board is adopting the rule exactly as proposed.

COMMENT 19: Three commenters asserted that New Rule XVI does not clearly define what accepted standards are regarding infectious diseases.

RESPONSE 19: The board agreed with the comment and is amending the rule accordingly.

COMMENT 20: A commenter suggested the board amend the titles of New Rules XXIV thru XXXVI for consistency among the titles of all the outdoor program rules.

RESPONSE 20: The board agreed with the comment and is amending the titles of New Rules XXIV thru XXXVI accordingly.

COMMENT 21: Two commenters suggested the board amend New Rule XXV to specify that training on de-escalation of crisis situations and passive physical restraint is required only if the outdoor program intends to utilize physical restraint.

RESPONSE 21: The board considered the comments at the April 2009 meeting and decided to revise the rule and require compliance with the standards for use of restraint for behavioral management contained in the Code of Federal Regulations (CFR). At the May 2009 meeting, the board was advised that the CFR reference was incorrect and the restraint standards could not be found in the CFR. Following lengthy discussion, the board decided to adopt New Rule XXV exactly as proposed.

COMMENT 22: Two commenters suggested the board amend New Rule XXVI to allow for physical exams within a reasonable period after participant enrollment. The commenters noted that some participants are escorted to programs and have not had a physical examination prior to enrollment.

RESPONSE 22: The board decided that allowing an exam within a reasonable time after enrollment would make the requirement as workable as possible, while still ensuring the protection of program participants. The board is amending the rule to allow physical exams up to five days following enrollment.

COMMENT 23: Three commenters questioned the participant to staff ratio in New Rule XXVII. The commenters asserted that the 20:1 ratio is unsafe in an outdoor setting and is well above outdoor program management standards.

RESPONSE 23: The board considered the comments, as well as input from board members who are familiar with outdoor program activities. The board discussed the welfare of outdoor program participants and the potential for the outdoor environment to increase the need for staff involvement. The board also noted that emergency situations could arise which require a staff member to escort a participant away from the outdoor experience and affect the participant to staff ratio. The board is therefore amending the rule to provide for such emergent situations and change to an 8 to 1 participant to staff ratio.

COMMENT 24: A commenter stated that the requirement in New Rule XXXII for staff training in medication administration should apply only if the field experience has participants who require medication.

RESPONSE 24: The board intends this rule to outline minimum acceptable training for staff in medication administration and is adopting the rule exactly as proposed.

COMMENT 25: Two commenters asked for clarification on which industry risk management procedures are required in New Rule XXXVI.

RESPONSE 25: The board agreed that (2) of this rule is not specific and could cause confusion among readers. The board is therefore amending the rule to delete the requirement to adhere to accepted risk management procedures.

COMMENT 26: One commenter asked about board rules regarding programs that contract out for river, rock-climbing, or horse-packing trips.

RESPONSE 26: The board notes that this comment is outside the scope of this current rulemaking project.

4. The board has amended ARM 24.181.301 and 24.181.402 exactly as proposed.

5. The board has adopted NEW RULE I (24.181.601), NEW RULE III (24.181.605), NEW RULE V (24.181.608), NEW RULE VI (24.181.609), NEW RULE VII (24.181.610), NEW RULE XIII (24.181.620), NEW RULE XIV (24.181.621), NEW RULE XV (24.181.622), NEW RULE XVII (24.181.624), NEW RULE XVIII (24.181.625), NEW RULE XIX (24.181.626), NEW RULE XX (24.181.627), NEW RULE XXI (24.181.628), NEW RULE XXII (24.181.701), NEW RULE XXIII (24.181.704), NEW RULE XXXVII (24.181.802), NEW RULE XXXVIII (24.181.803), NEW RULE XXXIX (24.181.807), and NEW RULE XL (24.181.810), exactly as proposed.

6 The board has adopted NEW RULE II (24.181.603), NEW RULE IV (24.181.607), NEW RULE VIII (24.181.611), NEW RULE IX (24.181.612), NEW RULE X (24.181.613), NEW RULE XI (24.181.615), NEW RULE XII (24.181.616), NEW RULE XVI (24.181.623), NEW RULE XXIV (24.181.706), NEW RULE XXV (24.181.708), NEW RULE XXVI (24.181.710), NEW RULE XXVII (24.181.711), NEW RULE XXVIII (24.181.716), NEW RULE XXIX (24.181.717), NEW RULE XXX (24.181.718), NEW RULE XXXI (24.181.719), NEW RULE XXXII (24.181.722), NEW RULE XXXIII (24.181.723), NEW RULE XXXIV (24.181.724), NEW RULE XXXV (24.181.728), and NEW RULE XXXVI (24.181.730), with the following changes, stricken matter interlined, new matter underlined:

NEW RULE II (24.181.603) RIGHTS AND RESPONSIBILITIES OF PROGRAM PARTICIPANTS (1) through (1)(d) remain as proposed.

- (e) communication privileges within the limitations of the program policy, excepting that at all times program participants will be allowed ~~unrestricted~~ timely access to contact the Montana abuse reporting hotline to report allegations of abuse;
- (f) through (2) remain as proposed.

NEW RULE IV (24.181.607) PROGRAM PARTICIPANT PROTECTION (1) through (2)(a) remain as proposed.

(b) is charged with a crime involving youth under the age of 18 years, physical or sexual violence against any person, any felony drug related offense, or is awaiting trial on the charges listed above.

(3) and (4) remain as proposed.

NEW RULE VIII (24.181.611) ADMISSIONS (1) Each program shall have written admissions policy and procedures including but not limited to documentation of:

(a) through (g) remain as proposed.

NEW RULE IX (24.181.612) TREATMENT PLANNING AND DELIVERY OF SERVICES

(1) through (1)(c) remain as proposed.

NEW RULE X (24.181.613) INCIDENTS, CRISIS INTERVENTION, AND EMERGENCY PLANS AND SAFETY (1) through (1)(d) remain as proposed.

(e) personnel procedures to follow in medical emergencies and when arranging for medical care which requires, at a minimum:

(i) through (2) remain as proposed.

NEW RULE XI (24.181.615) PARTICIPANT TRANSFER AND DISCHARGE

(1) remains as proposed.

NEW RULE XII (24.181.616) BEHAVIORAL MANAGEMENT ~~(1) Each program shall have written behavioral management policy and procedures that employs the least restrictive method to assure the safety of all the parties concerned (i.e. program participants and staff) and also includes:~~

~~(a) a definition of appropriate and inappropriate behaviors of program participants;~~

~~(b) acceptable and unacceptable staff responses to inappropriate behaviors;~~
and

~~(c) acceptable consequences to inappropriate behaviors.~~

~~(2) All staff will receive a copy of this policy and staff shall receive training relative to behavior management at least annually.~~

~~(3) The program behavioral management policy shall prohibit the following:~~

~~(a) excessive physical labor with no purpose other than for punishment;~~

~~(b) denying necessary food, clothing, bedding, rest, toilet use, or bathing facilities as punishment;~~

~~(c) verbal abuse, ridicule, humiliation, profanity, threats, or other forms of degradation directed at a program participant or a participant's family;~~

~~(d) forcing a program participant to take an uncomfortable position for an extended period of time, which is anticipated to cause pain, for no purpose other than for punishment;~~

~~(e) denial of visits or communication with the program participant's parent(s) or guardian(s) except as specified in the program's written policy, design and planned activities, the program participant's service plan, or court order;~~

~~(f) locked confinement;~~

~~(g) administration of medication for disciplinary purposes, for the convenience of staff, or as a substitute for appropriate treatment services;~~

~~(h) administration of discipline of a program participant by another participant without staff supervision;~~

~~(i) the intentional or malicious infliction of physical or mental suffering including pain;~~

~~(j) the use of pain to force compliance; and~~

~~(k) placement of a program participant alone in a locked room for nontherapeutic purposes.~~

~~(4) Programs shall only allow passive physical restraint when required in an emergency situation in which there is an imminent threat to life or physical safety of the program participant, staff, or others. Passive physical restraint shall not be associated with punishment in any way. Only staff trained in industry accepted de-escalation techniques and passive physical restraint, such as CPI and Mandt, may restrain program participants.~~

~~(5) Programs that use time out or short-term intervention for behavior modification or for therapeutic purposes will have written policy and procedures that have been provided to the program participants and legally responsible parties.~~

~~(6) Each program shall have written policy and procedures for handling emergency situations such as suicide threat or attempt, abuse, assault, and program participants running away from the program.~~

(1) The program shall employ methods to assure the safety of all concerned parties (i.e. program participants, staff, parents, and guardians).

(2) The program shall have written behavioral management policy and procedures including, but not limited to, the following:

(a) description of the methods of discipline to be used by the program which include:

(i) the philosophy of discipline, methods of discipline permitted, and the purpose of the discipline as it relates to the ongoing learning and development process for program participants;

(ii) a statement outlining that discipline methods must not employ the use of corporal punishment as defined in 20-4-302, MCA; and

(iii) the methods of discipline must not include abuse as defined in 53-21-102, MCA, including such things as verbal abuse, ridicule, humiliation, profanity, threats or other forms of degradation directed at the program participant or the program participant's family, or practices which are humiliating or degrading to the program participant.

(3) In developing the discipline methods for this policy, programs must take into account the following prohibitions:

(a) medication cannot be administered as a form of discipline or as a substitute for appropriate treatment services;

(b) program participants cannot be forced to take an uncomfortable position for an extended period of time, which is anticipated to cause physical pain, for no purpose other than for punishment;

(c) program participants cannot be denied visits or communication with the program participant's parent(s) or guardian(s), except as specified in the program's design and planned activities, or the program participant's treatment plan or court order;

(d) program participants may not be confined in a locked room; and

(e) program participants may not administer discipline to another program participant unless proper staff supervision exists and the discipline follows the written policy regarding participant to participant discipline interactions.

(4) If the program intends to utilize restraint as a method of behavioral management, the program must only use passive physical restraint methods.

(a) Restraint must be performed in a manner that is safe, proportionate, and appropriate to the severity of the behavior, the patient's size, gender, physical, medical, psychiatric condition, and personal history.

(b) Restraint may only be used in emergency situations to ensure the physical safety of the youth, parent(s) or guardian(s), other youth, or staff of the program and only when less restrictive measures have been found to be ineffective to protect the youth or others from harm.

(c) Restraint procedures must be implemented in accordance with program policies and discontinued when the behaviors that necessitated the restraint or seclusion are no longer in evidence.

(d) The policy governing the use of restraint must include a chain of notification within the organization, notification of parent(s) or guardian(s) and outline the manner in which the use of restraint is to occur.

(5) The behavioral management policy shall be provided to all staff and direct care staff shall receive training relative to behavioral management.

NEW RULE XVI (24.181.623) INFECTIOUS DISEASES (1) Each program shall have written policy and procedures designed to prevent or control infectious and communicable diseases ~~in accordance with accepted standards.~~

NEW RULE XXIV (24.181.706) OUTDOOR PROGRAM STAFF REQUIREMENTS (1) through (6) remain as proposed.

NEW RULE XXV (24.181.708) OUTDOOR PROGRAM STAFF TRAINING (1) through (2)(e)(v) remain as proposed.

NEW RULE XXVI (24.181.710) OUTDOOR PROGRAM PARTICIPANT ADMISSION REQUIREMENTS (1) through (1)(b) remain as proposed.

(c) a requirement that program participants have a physical examination by a licensed medical provider that has been completed within six months preceding or within five calendar days of enrollment into the program. Medical release forms for

each program participant must be kept by field staff team providing direct care to participants.

NEW RULE XXVII (24.181.711) RATIO OF OUTDOOR PROGRAM PARTICIPANTS TO STAFF (1) Outdoor programs shall have written policies establishing ratios between direct care staff and program participants which meet program participant needs for health and safety. The maximum program participant to direct care staff ratio shall not exceed ~~20~~ eight participants to one direct care staff member, except in an emergent situation.

NEW RULE XXVIII (24.181.716) OUTDOOR PROGRAM PHYSICAL ENVIRONMENT (1) through (3) remain as proposed.

NEW RULE XXIX (24.181.717) OUTDOOR PROGRAM TOOLS AND POTENTIALLY HAZARDOUS MATERIALS (1) remains as proposed.

NEW RULE XXX (24.181.718) OUTDOOR PROGRAM HYGIENE (1) and (2) remain as proposed.

NEW RULE XXXI (24.181.719) OUTDOOR PROGRAM WATER, FOOD, AND NUTRITION (1) remains as proposed.

NEW RULE XXXII (24.181.722) OUTDOOR PROGRAM MEDICAL AND MEDICATION MANAGEMENT, STORAGE, AND ADMINISTRATION (1) and (2) remain as proposed.

NEW RULE XXXIII (24.181.723) OUTDOOR PROGRAM EMERGENCY AND EVACUATION PLANS (1) remains as proposed.

NEW RULE XXXIV (24.181.724) OUTDOOR PROGRAM SOLO EXPERIENCE (1) remains as proposed.

NEW RULE XXXV (24.181.728) OUTDOOR PROGRAM EDUCATION (1) remains as proposed.

NEW RULE XXXVI (24.181.730) OUTDOOR PROGRAMS- HIGH ADVENTURE REQUIREMENTS (1) through (1)(j) remain as proposed.

(2) For the high adventure activities identified in (1), each program shall adopt written policy and procedures that address minimum training, experience, and qualifications for leaders and staff ~~and must adhere to accepted industry risk management procedures.~~

BOARD OF PRIVATE ALTERNATIVE
ADOLESCENT RESIDENTIAL OR
OUTDOOR PROGRAMS
JOHN SANTA, CHAIRPERSON

/s/ DARCEE L. MOE
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/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State August 17, 2009