VOLUME NO. 50 OPINION NO. 4

ADMINISTRATIVE LAW AND PROCEDURE - Montana Administrative Procedures Act, Central Intake system as "rule;"
PUBLIC HEALTH AND HUMAN SERVICES, DEPARTMENT OF - Creation of Central Intake system within authority granted by the legislature;
STATE GOVERNMENT - Department of Public Health and Human Services, Central Intake Program as "rule;"
STATUTES - Central Intake system not in conflict with Mont. Code Ann. § 41-3-201(1).
MONTANA CODE ANNOTATED - Sections 2-3-102(1), 2-4-102(11), (b), -302, 41-3-201, (1), -202(1), (2001);
REVISED CODES OF MONTANA, 1947 - Sections 10-902, -903, -1315;
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 8 (1973).

HELD:

1. The creation of the Central Intake system is well within the authority granted to the Department of Public Health and Human Services by the Legislature in Mont. Code Ann. § 41-3-202(1).

2. The administrative decision by the Department of Public Health and Human Services to establish the Central Intake system implements, interprets or prescribes law or policy. It is a "rule" for the purposes of the Montana Administrative Procedures Act. Thus the notice and hearing requirements of MAPA should have been followed prior to its implementation.

3. There are no "local affiliates" of the Department of Public Health and Human Services. As a result, Mont. Code Ann. § 41-3-201(1) should be read to require the reporting of child abuse or neglect to the Department, a requirement which is clearly satisfied by the reporting of child abuse or neglect to the Centralized Intake Bureau.

February 26, 2004

Mr. Mike Grayson

Anaconda-Deer Lodge County Attorney
118 East 7th Street, Suite 1-B
Anaconda, Montana 59711

Dear Mr. Grayson:

You have requested my opinion concerning the following questions:

1. Was the Department of Public Health and Human Services required either to adopt an administrative rule or obtain legislative authorization to institute a centralized intake system for the reporting of child abuse and neglect?

2. Can the Department of Public Health and Human Services lawfully refuse to receive reports of child abuse or neglect at local Department offices?

Prior to the 2001 Legislative Session, Mont. Code Ann. § 41-3-202(1) provided that:

> Upon receipt of a report that a child is or has been abused or neglected, a social worker, the county attorney, or a peace officer shall promptly conduct a thorough investigation into the circumstances surrounding the allegations of abuse or neglect of the child.

Arguably, this section required the Department of Public Health and Human Services (Department), or a county attorney or peace officer, to investigate each and every report of child abuse or neglect received by the Department.

However, pursuant to Senate Bill 116, enacted by the 2001 Legislature, Mont. Code Ann. § 41-3-202(1) was amended to read as follows:

> Upon receipt of a report that a child is or has been abused or neglected, **the department shall promptly assess the information contained in the report and make a determination regarding the level of response required and the timeframe within which action must be initiated. If the department determines that an investigation is required,** a social worker, the county attorney, or a peace officer shall promptly conduct a thorough investigation

> into the circumstances surrounding the allegations of abuse or neglect of the child.

Mont. Code Ann. § 41-3-202(1) (new language emphasized).

Thus, the 2001 Legislature granted to the Department the authority to assess reports of child abuse or neglect in order to determine whether an investigation was necessary, or whether some lesser response to the report was appropriate. Further the Legislature also granted the Department the authority to determine the appropriate period of time for response. However, Mont. Code Ann. § 41-3-202(1) is silent as to the method by which the Department is to implement this legislation. It was therefore necessary for the Department to develop a method by which the requirements of Mont. Code Ann. § 41-3-202(1) would be implemented. The method developed by the Department was to centralize the receipt, assessment, and determination of response to reports of child abuse or neglect. In furtherance of this method, the Department created its Centralized Intake system. The creation of this system is well within the authority granted to the Department by the Legislature in Mont. Code Ann. § 41-3-202(1).

That brings us to the issue of whether the Department has, by establishing its Central Intake system, adopted administrative rules without satisfying the processes required by the Montana Administrative Procedure Act (MAPA). Pursuant to Mont. Code Ann. § 2-4-302, before the Department may adopt or amend a rule, the Department must first give notice to the public of its intended action and give the public and opportunity to present their views on the intended action.

The controlling question is whether the Central Intake System is a "rule" as defined by MAPA. For the purposes of MAPA, "rule" is defined as " . . . each agency regulation, standard, or statement of general applicability that **implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.** The term includes the amendment or repeal of a prior rule." Mont. Code Ann. § 2-4-102(11) (emphasis supplied).

In describing the Central Intake System on its website, the Department explains that

> [b]eginning January 1, 2002, Child and Family Services will implement a Centralized Intake (CI) system for reporting child abuse and neglect. In the past, all reports have been made to local offices or to individual workers in the community. With Centralized Intake, all reporters will call the statewide toll-free number 1-866-820-KIDS (1-866-820-5437), that can be accessed from anywhere in the nation. This will be a significant change, as reports will

> no longer be taken locally. However, Centralized Intake will result in increased benefits to Montana's children and families. We have studied similar centralized reporting systems in other states, and after careful evaluation, we feel confident Montana will benefit from this streamlined reporting system.

DPHHS website, New Directions In Reporting Child Abuse and Neglect Centralized Intake in 2002, (March, 2003), at http://www.dphhs.state.mt.us/about_us/ divisions/ child_family_services/publications/new_direction_in_reporting.htm.

This Central Intake system was designed to implement the new responsibilities acquired by the Department under Mont. Code Ann. § 41-3-202(1) (2001). It is a system that provides the procedures the department intends to utilize to implement the new law. The Central Intake system appears to fall within the plain language definition of "rule" as defined by MAPA.

For purposes of MAPA, the term "rule" does not include "statements concerning only the internal management of an agency or state government and **not affecting private rights or procedures available to the public**, including rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system; . . . ." Mont. Code Ann. § 2-4-102(11)(b) (in relevant part) (emphasis supplied). So, a state agency is permitted to make policies and decisions regarding internal management without engaging in MAPA rulemaking if the policies do not affect "private rights or procedures available to the public." Additionally, without engaging in the usual notice and comment procedures, a state agency may adopt an administrative rule that informs the public of the agency's organization, operations and methods, including methods by which "the public may obtain information or make submissions or requests." Mont. Code Ann. § 2-4-201(1).

However, the Department itself describes the new Central Intake system as a "significant change". This system dramatically changes how the public reports incidents of child abuse and neglect and how the government intends to respond to such reports. In other words, this substantially changes the reporting and handling of child abuse and neglect procedures available to the public. This does not simply affect employees of the Department as do the examples listed under the exclusion from the definition of "rule" found in Mont. Code Ann. § 2-4-102. Interpreting this exception to allow government agencies to adopt major changes in policies affecting the public without engaging in formal rulemaking and then just announce them in their periodic revisions of the organizational rule would defeat the purpose of MAPA.

Though there are no cases or Attorney General's Opinions precisely on point, Attorney General Robert Woodahl opined that state plans would fall within the definition of "rule" for purposes of MAPA. 35 Mont. Op. Att'y Gen. No. 8. He opined that state plans would contain "agency standards which implement law or policy." 35 Mont. Op. Att'y Gen. No. 8. Further, the Montana Supreme Court determined that the administrative decision of the Department of Revenue to alter the formula by which it taxed airlines implemented, interpreted or prescribed law or policy and thus qualified as a "rule" for purposes of MAPA. Northwest Airlines, Inc. v. State Tax Appeal Bd., 221 Mont. 441, 445 (1986). The Court reasoned that the effects of the change in formula were not inconsequential and limited to employees of Department of Revenue, but the effects had a substantial impact on Northwestern Airlines. Id.

In your letter, you advance several arguments about whether the Central Intake system is a good idea. There is no indication in your letter that you were given an opportunity to make these points before the new policy was adopted or that the Department considered them before it concluded that the Central Intake system was a good idea. It is precisely these kinds of arguments that should be considered in the rulemaking process. Rulemaking is not just a meaningless bureaucratic process; rather, the public is entitled to notice and the chance to comment to make sure that the agency has the full benefit of views from the interested public. These are views that might not percolate to the top within the agency itself.

The administrative decision by the Department to establish the Central Intake system implements, interprets or prescribes law or policy. Further, it does not constitute a statement affecting strictly the internal management of the Department. Rather, the Central Intake system is a dramatic change in the way the State of Montana through the Department handles reports of child abuse and neglect. It had a substantial impact on the public and the procedures it must follow to report child abuse and neglect. It is a "rule" for the purposes of MAPA. Thus the notice and hearing requirements of MAPA should have been followed prior to its implementation.

Your next question is whether the Department can lawfully refuse to receive reports of child abuse or neglect at local Department offices. As discussed above, the creation of the Central Intake system is well within the authority granted to the Department by the Legislature in Mont. Code Ann. § 41-3-202(1).

Mont. Code Ann. § 41-3-201, Montana's mandatory reporting statute, requires certain professionals to make referrals to the Department if they know of, or suspect child abuse or neglect. The statute states that the professionals and officials report abuse and neglect "promptly to the department of public health and human services or **its local affiliate**." Mont. Code Ann. § 41-3-201 (emphasis supplied). You argue that the Central Intake system

is in conflict with this mandatory reporting statute. However, the Department no longer has "local affiliates." This term stems from the days when child protective service responsibilities were shared between counties and the state. The Department is now solely responsible for assessing reports of child abuse or neglect, determining whether an investigation is necessary, or whether some lesser response to the report is appropriate and determining the appropriate period of time in which to respond.

Mont. Code Ann. § 41-3-201 was originally adopted in 1965 as § 10-902, Montana Revised Code Ann. (1947). The original provision required doctors, teachers and social workers to report known or suspected child abuse or neglect to the county attorney, who, pursuant to § 10-903, Montana Revised Code Ann. (1947) (the precursor to Mont. Code Ann. § 41-3-202), was required to investigate the report. In 1973, § 10-902, Montana Revised Code Ann. (1947), was amended to require that mandated reporters report known or suspected child abuse or neglect to "the department of social and rehabilitation services, its local affiliate, and the county attorney. . . .," and § 10-903 was amended to require a social worker to conduct an investigation.

Also, in 1974, § 10-1315, Montana Revised Code Ann. (1947) was enacted, which provided that "the department of social and rehabilitation services and the county welfare department shall have the primary responsibility to provide the protective services authorized by this act. . . ."

In 1979, § 10-902, Montana Revised Code Ann. (1947) (which had since been renumbered Mont. Code Ann § 41-3-201) was amended to require incidents of child abuse or neglect be reported to "the department of social and rehabilitation services or its local affiliate, which then shall notify the county attorney." Section 10-903, Montana Revised Code Ann. (1947) (which had been renumbered to Mont. Code Ann § 41-3-202) was amended to require that an investigation be conducted by ". . . a social worker or the county attorney or a peace officer . . . ." Section 10-1315, Montana Revised Code Ann. (1947) (which had been renumbered to Mont. Code Ann § 41-3-302) was amended to add the requirement that "the county welfare department shall respond to emergency reports of known or suspected child abuse or neglect 24 hours a day, 7 days a week."

So, from 1965 until 1973, the county attorney was responsible for receiving and investigating reports of child abuse or neglect, and acting on those reports. In 1973 and 1974, however, the system was changed to require that reports be made to the county attorney, to the department of social and rehabilitative services, **and** to the department's local affiliate. Investigation of the report was to be conducted by a social worker and the responsibility for providing child protective services was shared between the Department of Social and

Rehabilitative Services, a state agency, and the county welfare department, a division of the local county government.

In 1979, the system was changed again to the extent that reports were no longer made directly to the county attorney; the authority to conduct an investigation was expanded to include
social workers, peace officers, and the county attorney. The county welfare department was specifically designated as the provider of emergency child protective services on a 24-hour-a-day, 7-days-a-week basis.

Finally, in 1987, the county welfare departments (and, by implication, the counties) were completely removed from the child protective services process, with the Department of Family Services being the recipient of reports of child abuse or neglect, the investigator of reports of child abuse or neglect, and the sole agency responsible for providing child protective services 24 hours a day, 7 days a week. The Department of Public Health and Human Services has now assumed those duties.

From 1974 through 1987, the responsibility for providing child protective services was shared between a state agency (SRS or DFS) and a county agency, i.e. the various county welfare departments. Furthermore, from 1979 through 1987, the counties, through their welfare departments, were the provider of emergency child protective services. So, the intent of requiring that child abuse or neglect be reported to the department and to its "local affiliate" was clearly to accommodate this sharing of child protective service responsibilities between a state agency and the county. In other words, the department's "local affiliate" for the purposes of § 10-902, Montana Revised Code Ann. (1947), and Mont. Code Ann. § 41-3-201, was the county welfare department.

Now, however, there is no "local affiliate" of the Department regarding child protective services. The county is no longer involved in the provision of child protective services. The Department social workers located in each county are neither county employees, nor are they part of some local affiliate; rather, they are simply part of the Department. In other words, the term "local affiliate" in Mont. Code Ann § 41-3-201(1) is really nothing more than a leftover term from previous versions of the statute, and has no practical effect under the current child protective services system.
Further, nothing in Mont. Code Ann. § 41-3-201 requires Department personnel in each county to accept reports of child abuse, nor does it prohibit those personnel from referring reporters to the Centralized Intake Bureau. As a result, Mont. Code Ann. § 41-3-201(1), should be read to require the reporting of child abuse or neglect to the Department, a requirement which is clearly satisfied by the reporting of child abuse or neglect to the Centralized Intake Bureau.

However, since the Central Intake system was not adopted in accordance with MAPA, it cannot currently be used to restrict which Department personnel may receive a report. Therefore, until a properly adopted administrative rule is in place, mandatory reporters may fulfill their reporting obligation by reporting known or suspected child abuse to a local child protective services worker or supervisor as has been the procedure in the past or by making reports to the central intake system.

THEREFORE, IT IS MY OPINION:

1. The creation of the Central Intake system is well within the authority granted to the Department of Public Health and Human Services by the Legislature in Mont. Code Ann. § 41-3-202(1).

2. The administrative decision by the Department of Public Health and Human Services to establish the Central Intake system implements, interprets or prescribes law or policy. It is a "rule" for the purposes of the Montana Administrative Procedures Act. Thus the notice and hearing requirements of MAPA should have been followed prior to its implementation.

3. There are no "local affiliates" of the Department of Public Health and Human Services. As a result, Mont. Code Ann. § 41-3-201(1) should be read to require the reporting of child abuse or neglect to the Department, a requirement which is clearly satisfied by the reporting of child abuse or neglect to the Centralized Intake Bureau.

Very truly yours,

MIKE McGRATH
Attorney General

mm/pdb/jym