Montana

I. Background

Montana's child support enforcement program is state administered by the Child Support Enforcement Division (CSED), which is housed within the Department of Public Health and Human Services. According to unaudited data, at the end of federal fiscal year 2006, Montana's IV-D program had 37,859 open IV-D cases[1] and 168 full-time equivalent staff.[2] That year Montana scored above the national average on four of the five federal performance measures (paternity, support order establishment, current collection, and arrearage collections). The state was lower than the national average in one performance measure (cost-effectiveness).

The support agency has had administrative authority to establish support orders since 1975. That authority has expanded over time. Paternity establishment was the last function to "go administrative."

The main impetus for child support administrative procedures was timeliness; the judicial process was lengthy, resulting in long delays in parents receiving needed support. As the state began failing performance audits related to time frames, the legislature authorized an expansion of administrative authority. Another factor in Montana is the vast size of the state. Given the geographical distances, a reliance solely on judicial processes would be problematic for both litigants and the courts. Also noteworthy is the lack of judicial resources. The courts are not well funded. Montana does not have any specialized family law courts or judicial resources in family law cases; this lack of district court resources has resulted in informal, anecdotal judicial support for developing administrative processes. The volume of IV-D cases has grown over the years; it would be difficult for courts to timely process such a large number of cases.

The authority for Montana's administrative procedures is at Montana Code §§ 40-5-201 through -225; 40-5-401 *et seq*.; 40-5-701 *et seq*.; 40-5-801 *et seq*.; and 40-5-901 *et seq*. The agency also follows administrative regulations. Hearing procedures are detailed at Montana Administrative Rule 37.62.901 *et seq.*

II. Due Process Summary

Before any administrative action is taken, CSED sends the parties a notice. In a paternity case, the agency sends the alleged father a letter informing him of the allegation of paternity. The next notice is an official Notice of Parental Responsibility and Notice of Financial Responsibility. When a support establishment case is opened, the agency serves both parties with a Notice of Financial Responsibility. In a modification action, the agency serves the parties with a Notice of Administrative Review.

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* Interview with Amy Pfeifer, Agency Attorney, Montana Child Support Enforcement Division.
[1] Table 4, Statistical Program Status, OCSE FY 2006 Preliminary Data Report.
[2] State Box Score, OCSE FY 2006 Preliminary Data Report.

The notice informs the parties of the proposed action and of their right to contest the notice and finding, within a certain time period, by requesting an administrative hearing. In the absence of a timely response, the agency will prepare a default order in accordance with the notice and finding. The agency submits the default order to an administrative law judge (ALJ) for signature.

If there is a timely contest to the Notice, a hearing is scheduled before an ALJ. In the interim, there is the opportunity for the party to meet informally with an agency caseworker in order to try to reach an agreement.

Administrative law judges in Montana are employees of the state child support agency and directly supervised by the state IV-D director. However, they are part of an independent hearings bureau, and housed in a separate building in which no other child support employees are located. The ALJs are lawyers. (In the early years of administrative process, there was no requirement that the ALJ be a lawyer.)

Administrative hearings are governed by the Montana Administrative Procedure Act. Parties may be represented by attorneys, but legal representation is not required. A CSED caseworker is authorized to initiate, appear in, and participate in a contested case under the ultimate direction of, and in consultation with, a CSED attorney. IV-D attorneys generally do not participate in administrative hearings. ALJs are trained to work with pro se litigants. They ask extensive questions of witnesses. A record is made of the proceeding. In Montana, all administrative hearings are conducted by teleconference methods. The rare exception is if a party invokes MCA § 40-5-226, or similar language at §§ 40-5-414 and 40-5-703(2), which provides: "At the request of a party or upon a showing that the party's case was substantially prejudiced by the lack of an in-person hearing, the hearings officer shall grant a de novo in-person hearing."

The administrative decision must include findings of fact and conclusions of law. The ALJ prepares a proposed decision and order, which is served on each party. The parties have 20 days to review the proposed order and file a motion to review the proposed order. If there is no motion, the ALJ may enact the proposed decision and order as a final CSED order. Any motion for review must be based upon one of the following grounds:

(a) Through inadvertence or mistake, the ALJ overlooked an important fact presented at the hearing which could affect the decision;

(b) The ALJ considered some fact that is not in the hearing record;

(c) A party requested a specific finding of fact or conclusion of law which was not made;

(d) The ALJ failed to consider a law, a policy or other material which the ALJ should have included as a matter of course;

(e) The ALJ inappropriately applied official notice to a fact or other material;

(f) When the admissibility of evidence was ruled upon after a matter was submitted for decision, the ALJ improperly accepted or rejected the evidence;

(g) New evidence was discovered or became accessible after the hearing was closed and that evidence was not reasonably available at the time of the hearing;

(h) The ALJ based the order on a mistake of fact or law; or
(i) There have been intervening changes in controlling law.

The motion must be considered by the same presiding ALJ who issued the proposed decision and order. Each party has an opportunity to respond to the motion. After considering the motion and responses to the motion, the ALJ may affirm the proposed decision or correct, amend, or modify it as necessary. Such order becomes the final CSED decision and order.

Montana promulgated the proposed and final order process in order to provide an opportunity for the parties and the agency to identify clerical errors, missing findings of fact, and other mistakes in the order. The proposed order stage reduces later motions to correct an order for clerical mistakes; often the ALJ lost jurisdiction to act on such a motion because the time was "running" for the parties to file a request for judicial review.

Once a final administrative decision is made, it is immediately enforceable. The order does not have to be approved or ratified by the court. However, all orders that establish support are abstracted to the district court so that the agency has the judgment lien effect of a district court order.

Individual parties may appeal the final decision of an ALJ to the district court, which is a civil court of general jurisdiction; the agency cannot petition for judicial review. Any appeal is heard "on the record." However, parties can move to have the record supplemented. If there is such a motion, the case goes back before the ALJ to hear the additional evidence to supplement the record.

The one exception to the finality of an administrative order is the modification of a judicial order. CSED can administratively modify administrative support orders following a notice of administrative review and opportunity for an administrative hearing. However, CSED cannot administratively modify a court order. In fact, the only time Montana's administrative procedures have been challenged was in the context of an attempted administrative modification of a court order. In 2000, the Montana Supreme Court found that the statute, which then existed, granted CSED judicial power to make binding child support orders without mandatory judicial review; the statute was therefore an unconstitutional violation of the separation of powers clause of the Montana Constitution.

In response to the appellate decision, the legislature amended Montana's administrative procedures for modification. Under current legislation, the agency can use its administrative processes to enter a proposed modified support order. However, the order does not become effective as a final order until the modified order is filed with and approved by the court that entered the order.

III. Establishment of Parentage

As soon as a case is opened, CSED sends the alleged father a Notification of Paternity Claim by first class mail. The Notification informs the man of the allegation of

parentage. By statute, this notification must "be given to the alleged father in a manner that places the demands of individual privacy above the merits of public disclosure. The notification must include the name of the mother and the date of birth or the projected date of birth if the child has not yet been born."

CSED later serves an official Notice of Parental Responsibility, which is served on the alleged father by personal service or certified mail. This notice informs the alleged father of his right to request genetic testing, of the opportunity to enter into a consent order[3], and of his right to request a hearing on the issue. Usually accompanying the Notice of Parental Responsibility is a Notice and Order Concerning Support. Although the Notice of Parental Responsibility is not served on the custodial parent, the Notice and Order Concerning Support is. [See the section on Support Establishment for a discussion of the Notice and Order Concerning Support]. The custodial parent is served by acknowledgment of service, personal service, or certified mail, restricted delivery.

Parties have 20 calendar days from service to respond to the Notice. The alleged father can either deny paternity or contest the proposed support amount. If there is no response to the notice, the agency will prepare a default order of paternity[4] and support and submit it to the ALJ for signature. Once properly docketed and entered by the OALJ, the order has the full effect of a District Court order. A copy of this final order is sent by regular mail to the addresses at which the parties were served. The order takes effect within 10 days after entry of the default unless the alleged father before the 10th day presents good cause for failure to make a timely denial.

If the alleged father requests a paternity hearing, the proposed support order is stayed and there is a hearing before an ALJ. The hearing must initially be conducted by teleconferencing methods and is subject to the provisions of the Montana Administrative Procedure Act. At the request of a party, the ALJ must, at the close of a teleconference hearing, grant a de novo in-person hearing. A party can appeal the ALJ decision to the court.

The purpose of the administrative hearing is to determine whether the alleged father should be ordered to participate in genetic testing.[5] If the ALJ finds that there is sufficient evidence that the two people engaged in an act during the probable time of conception that could have resulted in the conception of the child, the ALJ will order genetic testing. If genetic test results show a 95% or higher probability of paternity, there is a presumption of paternity. The alleged father is provided the opportunity to sign a paternity acknowledgment. If he does not sign the acknowledgment, the agency will nevertheless proceed with support establishment because of the presumption.[6] If the man

[3] A consent order is not possible if the mother has alleged several men as the possible father.
[4] The exception is a case where the mother names several possible fathers. The department may not enter a default order if there is more than one alleged father unless the default applies to only one of them and all others have been excluded by the results of paternity genetic testing.
[5] Because of an appellate decision, the agency must meet the search warrant standard in order to compel genetic testing.
[6] Where the agency proceeds with support establishment on the basis of a presumption of paternity, there is no final ALJ order declaring that the man is the legal father.

signs the paternity acknowledgment, a final order is entered declaring that the man is the legal father. If the alleged father had initially agreed to genetic testing in response to the Notice, part of that agreement to participate in testing includes an agreement that a final order will be entered naming him the legal father if the test results indicate at least a 95% probability of paternity. In such a situation, the final ALJ order will declare that the man is the legal father of the child.

Pursuant to MCA § 40-5-234, if the genetic test results exclude the alleged father from parentage, the agency can seek entry of an order on nonpaternity. However, according to the agency representative, that is rarely done in practice. The agency simply no longer proceeds against that alleged father.

IV. Support Establishment

When a case is opened that needs the establishment of a support order, the agency sends the parties a Notice and Order Concerning Support (NOCS). The Notice is served on the parties by certified mail or personal service. The notice includes a proposed support amount, which is based on income information provided by the custodial parent and databases that the agency can access. In the absence of any income information, the caseworker can impute income at fulltime minimum wage. Where the agency knows of the noncustodial parent's work history, the worker can impute income using the Department of Labor wage statistics. In the absence of income information, the caseworker has discretion regarding how to impute income.

In addition to the proposed support amount, the NOCS lists:

- The commencement date of the obligation
- The first payment date
- A notice of immediate income withholding

Parties have 20 calendar days from service to respond to the Notice. If either party contests the proposed support amount, he or she can make a hearing request to an ALJ. Pending that hearing, it is possible for the parties to try to work informally with a caseworker. For example, the parties may present the caseworker with additional income information, which may result in a revised guideline calculation. Caseworkers have some discretion to deviate from the guideline amount, based on permissible deviation factors, and with a supervisor's approval. If there is a proposed consent prior to the ALJ hearing, the caseworker will prepare a Modification Consent Order for signature by both parties and the ALJ. If there is no agreement but the caseworker revises the support calculation as a result of more information or clarification of income information, the caseworker may prepared an amended Notice and Order Concerning Support. The agency may serve this amended notice on the parties by regular mail; it triggers another opportunity for the parties to request an administrative hearing.

If there is no response to the notice, CSED will prepare a default order of support for signature by the ALJ. A copy of this final order is sent by regular mail to the addresses at

which the parties were served. The order is immediately enforceable and does not require court ratification. However, the order is typically docketed with the district court in order to have the full effect of a district court order.

There does not appear to be a procedure for reopening or setting aside a default support order, other than a Rule 60(b) motion.

If a parent timely requests an administrative hearing by filing a written request with a statement of claimed defenses to the support obligation, the hearing will be before an ALJ. See the discussion within the Due Process section concerning administrative hearings.

An individual party can seek judicial review of a final administrative decision.

Although a final administrative order is effective and enforceable without filing and docketing the order in the district court, there are certain judicial remedies that are not available for enforcement of an administrative order. For example, CSED may not request contempt of court proceedings or a writ of execution based on the administrative order unless the administrative order is first docketed with the district court. The administrative order may not operate as a judgment lien, unless the order is first docketed with the district court or a lien is otherwise perfected under Montana laws. For that reason, the agency abstracts all administrative orders that establish support to the district court.

V. Review and Adjustment/Modification

Montana law does not provide for Cost of Living Adjustments (COLAs) in administrative support orders.

The obligor, obligee, or CSED may apply for the review of a court or administrative support order. The application must set forth facts meeting the Montana criteria for review of an order. Upon receiving an application in a IV-D case, CSED will serve the parties with a Notice of Administrative Review and an Order for the Production of Financial Information. Service is either personally or by certified mail, restricted delivery. Service is considered effective if, in the absence of a return receipt, the person to whom the notice was mailed requests a hearing or appears at the administrative review hearing.

The notice must include a statement of the following:

- the possible consequences of the review
- the right of the obligor or obligee to request the ALJ to issue subpoenas compelling the appearance of witnesses and the production of documents for a hearing
- the proposed change in the support order
- that if a party does not timely file a request for a hearing, support will be ordered as declared in the notice or in accordance with child support guidelines.

An Order for Production of Documents directs the parties to return financial information no later than the 20th day after the date of service.

Pursuant to statute, the Department must make available procedures and forms that allow the obligor or the obligee to complete the review process without legal counsel. When the parties provide financial information, tax returns, etc. in response to the first Modification Notice and Order to Produce, the caseworker reviews the information and does a new guideline calculation if necessary. If the new calculation changes the proposed order from the amount in the first Modification Notice served, the caseworker will issue an Amended Modification Notice and Order. There is no order to produce in this one.

If there is no objection or hearing request to the first or amended Modification Notice, there is deemed consent and the Modification Notice and Order proceed to the ALJ for entry of an order.

Upon receipt of a timely request for a hearing, a telephonic administrative hearing is scheduled. If a party fails to appear at the hearing, after service, the ALJ may enter a default order based on the best information available concerning the defaulting parent's income and financial condition. If the underlying order is an administrative order, the ALJ order is a final agency decision and subject to judicial review pursuant to the Montana Administrative Procedure Act.

If the underlying order is a judicial order, the administrative modification must be filed with and approved by the court that issued the order before the modification is effective. The parties must be notified by mail or personal service that the proposed modified order has been filed with the court. A party may file a written objection with the court within 20 days of service. The court must set a date for a hearing on the objection to the proposed order. If no objection is filed, the court may without further notice enter its order. The court may adopt the administrative modified support order, modify it , reject it, or remand it to the ALJ with instructions for further hearing.

The procedure for modification of a judicial order is relatively new and in response to a 2000 decision of the Montana Supreme Court. In *Seubert v. Seubert*, 2000 MT 241 (2000), a district court had issued a divorce decree that included support terms. Later, the mother sought IV-D services to modify the court order. In compliance with then statutes, the agency filed a Notice of Registration with the district court, notifying the court of the possibility that CSED would modify the support order. The district court ordered CSED to cease and desist. Following a hearing to consider the issue, the district court issued an order permanently enjoining CSED from modifying any child support order issued by a district court. CSED appealed to the Montana Supreme Court, which affirmed the district court decision.

The Montana Supreme Court found that the statutes in question violated the separation of powers clause of the Montana Constitution. It did not agree with CSED's arguments that,

because parties could seek a judicial review of the administrative modification, the agency was only performing a quasi-judicial function. The Supreme Court distinguished the Montana procedures from those upheld in Iowa and Missouri.[7]

In Missouri and Iowa, "judicial review is an automatic and mandatory process." In Missouri, any orders issued by the administrative agency are not effective unless they are approved by the judicial department. Similarly, Iowa's statutory scheme requires that the Iowa Department of Human Services present the administrative order, *ex parte*, to the district court for review and approval: "Unless defects appear on the face of the order or on the attachments, the district court shall approve the order. The approved order shall have all the force, effect, and attributes of a docketed order or decree of the district court."

The Montana Supreme Court emphasized that, in contrast, a CSED modification was effective prior to any judicial review. "Should an obligor or oblige believe CSED's modification to be erroneous, they may petition for judicial review of that decision and such a petition is deemed a new proceeding, which requires a new filing fee. Moreover, the judicial review is limited by MAPA, which provides that, with regard to the factual record, the reviewing court may not substitute its judgment of that of the agency. . . . Additionally, MAPA provides that the reviewing court may only reverse any agency's decision if that decision is arbitrary and capricious, or is characterized by an abuse of discretion. . . . Accordingly, we conclude that §§ 40-5-272 and -273, MCA (1997), to the extent that they grant CSED the 'judicial power' to make and enforce binding child support orders without automatic and mandatory judicial review, are an unconstitutional violation of the separation of powers clause of the Montana Constitution."

In a subsequent decision, the Supreme Court clarified that its decision applied prospectively.

As a result of the *Seubert* decision, the legislature amended Montana's administrative procedures for modification to require court approval of any proposed administrative modification of a court order.

VI. Enforcement

The Montana child support agency has a full range of administrative enforcement remedies, e.g., income withholding, license suspension, credit bureau reporting, administrative writs of execution, and warrants for distraint to execute a support lien .

Before taking a particular enforcement action, CSED serves the noncustodial parent with the appropriate Notice as required by statute. There is very little discretion on the part of the agency since the statute sets forth the criteria for each remedy. The notice advises the noncustodial parent of the proposed action and of the time period for requesting a hearing before an ALJ; the request must be made within 20 days of service of the notice.

[7] *See Chastain v. Chastain*, 932 S.W.2d 396 (Mo. 1996); *State of Iowa, ex rel. Sara Allee v. Gocha*, 555 NW.2d 683 (Iowa 1996).

Montana handles license suspension differently from many states because the child support agency has administrative authority to actually do the suspensions. For example, the agency can issue an administrative order suspending a driver's license, which DMV enters into its own system. The exception is with attorney licenses. Because attorneys are licensed by the court, only the court can suspend an attorney's license.

Unlike establishment orders, the agency usually does not abstract its administrative enforcement orders to district court, because nothing would be gained legally. For example, if the child support agency issues a license suspension order, by law the licensing agency must honor the order.

VII. Statistics

Timeframes

In federal fiscal year 2006, Montana established 97% of its support orders within six months of successful service of process, and 98% within 12 months. This performance exceeds the federal benchmark that 75% of orders must be established within six months and 90% within one year. In 2% of the cases, Montana reports that establishment of a support order took more than 12 months from service.[8]

Contest to Administrative Notice

In January 2007, there were 301 paternity determinations, most through the acknowledgment process. In 37 cases, the agency sent out an administrative Notice of Parental Responsibility. Of those cases, there were 2 requests for an administrative hearing. One administrative hearing was held; the other case was resolved without a hearing.

In January 2007, the agency served 254 Notice and Order Concerning Child Support (NOCS). In response, there were 22 hearing requests. There were 17 hearings actually held.

In January 2007, of 1246 income withholdings that were issued, there were only 12 requests for an administrative hearing. Seven hearings were held.

The January 2007 statistics are representative of the low number of requests that parties make for an administrative hearing.

Overall, for all administrative actions from January through May 2007, there were 348 administrative hearing requests and 193 hearings held. From January through December 2006, there were 796 requests for an administrative hearing, and 451 hearings held. From January through December 2005, there were 913 administrative hearings requested and 447 held.

[8] Source: CSED Self-Assessment Report, FFY 2006. Report Date: March 2007.

Number of Administrative Law Judges
There are two full time ALJs who hear the IV-D child support cases.

VIII. Strengths/Limitations

The only limitation noted by the agency representative is that the agency cannot enforce an order by contempt; that enforcement remedy must be done judicially.

IX. Recommendations/Best Practices

Do everything you can to ensure due process.

Address the administrative modification of judicial orders.

Address the ability to conduct telephonic hearings.

Address the unauthorized practice of law issue.

> Originally, in Montana, caseworkers were allowed to cross examine witnesses during the administrative hearing. That changed within the last seven years. Now the caseworkers can testify but they are not allowed to examine witnesses.

It is probably preferable to have the ALJ be part of a separate agency so that there is no perception of partiality.

Make sure the ALJs make very thorough findings. Montana ALJs do that. Additionally all telephonic hearings are taped. If an administrative hearing decision is appealed to the court, the ALJ has 30 days to prepare the record, which is quite extensive.

Depending upon the state's ethnic population, the state may need to consider the cultural issues related to telephonic hearings. A telephone hearing requires active participation by the parties. In some cultures, parties – especially women – are reluctant to "speak up" on the phone.

Selected Montana Statutes
Montana Code Annotated

40-5-202. Department of public health and human services -- powers and duties regarding collection of support debt.
(12) The department may adopt and enforce the rules necessary to carry out the provisions of this part.

(13) While providing services under this chapter and in order to carry out the purposes mentioned in this chapter, the department, through its director or the director's authorized representatives, may:

(a) administer oaths;

(b) certify official acts and records;

(c) issue investigative and hearing subpoenas;

(d) order discovery before and after a hearing;

(e) hold prehearing and settlement conferences;

(f) compel the attendance of witnesses and the production of books, accounts, documents, and evidence;

(g) conduct proceedings supplementary to and in aid of a writ of execution or warrant for distraint, including a hearing on a claim that property is exempt from execution and the examination of an obligor or other person in the manner provided for the taking of a deposition in a civil action; and

(h) perfect service of investigative and hearing subpoenas by certified mail or in the manner prescribed for service of a summons in a civil action in accordance with the Montana Rules of Civil Procedure.

(14) In addition to any other requirement for service provided by the Montana Rules of Civil Procedure, if a person is required to give notice to, serve, or provide a written response to the department under this chapter, the notice, service, or response must be made to the department's child support enforcement division.

(15) The department may collect any funds received under this chapter, and wrongfully retained, by the obligor through any remedy available for collection of child support.

(16) A hearing on a claim that property is exempt from execution must initially be conducted by teleconference methods and is subject to the Montana Administrative Procedure Act. At the request of a party or upon a showing that a party's case is substantially prejudiced by the lack of an in-person hearing, the hearings officer shall grant a de novo in-person hearing.

40-5-213. Financial statements by obligor -- penalty. (1) If the department is providing child support enforcement services under this part and has reasonable cause to believe that a support obligation is owed, an obligor, upon written request, shall complete a statement, under oath, stating the obligor's:

(a) current monthly income;

(b) total income over the past 36 months;

(c) the number of dependents for whom the obligor is providing support;

(d) the amount the obligor is contributing toward the support of a child for whom the department is providing services;

(e) current monthly living expenses; and

(f) all other information pertinent to the obligor's financial condition.

(2) The department may require additional financial statements from the obligor during the period the department is providing services to the child.

(3) Failure to comply with this section is a misdemeanor.

40-5-222. Support debt based upon support order -- notice -- contents -- action to collect. (1) The department may issue a notice of a support debt accrued or accruing based upon a support order. The notice may be served upon the obligor in the manner prescribed for the service of a summons in a civil action in accordance with the provisions of the Montana Rules of Civil Procedure, demanding payment within 20 days of the date of receipt.

(2) The notice of debt shall include:

(a) a statement of the support debt accrued or accruing, computable on the amount required to be paid under any support order;

(b) a statement that the property of the debtor is subject to collection action;

(c) a statement that the property is subject to distraint and seizure and sale;

(d) a statement that the net proceeds will be applied to the satisfaction of the support debt; and

(e) a statement that the obligor is entitled to a fair hearing.

(3) Action to collect the support debt by distraint and seizure and sale is lawful after 20 days from the date of service upon the obligor or 20 days from the receipt or refusal by the debtor of the notice of debt.

(4) Within 20 days of the date of service of notice of support debt, the obligor may request a fair hearing as provided in 40-5-226.

40-5-225. Notice of financial responsibility -- temporary and final support obligations -- administrative procedure. (1) In the absence of an existing support order, when the requirements of this section are met, the department may enter an order requiring a child's parent or parents to pay an amount each month for the support of the child. An order issued under this section must include a medical support order as required by 40-5-208.

(2) An action to establish a support order must be commenced by serving a notice of financial responsibility on the parent or parents. The notice must include a statement:

(a) of the names of the child, the obligee, and, if different than the obligee, the child's guardian or caretaker relative;

(b) of the dollar amount of the support obligation to be paid each month for the child, if any;

(c) that the monthly support obligation, if any, is effective on the date of service of the notice, unless an objection is made and a hearing is requested, and may be collected during the proceeding that establishes the support obligation by any remedy available to the department for the enforcement of child support obligations;

(d) that in addition to or independent of child support, the parent or parents may be ordered to provide for the child's medical support needs;

(e) that any party may request a hearing to contest the amount of child support shown

in the notice or to contest the establishment of a medical support order;

(f) that if a party does not timely file a request for hearing, support, including medical support, will be ordered as declared in the notice or in accordance with the child support guidelines adopted under 40-5-209;

(g) that if a party does request a hearing, the other parties may refuse to participate in the proceedings and that the child support and medical support order will be determined using the information available to the department or provided at the hearing;

(h) that a party's refusal to participate is a consent to entry of a child support and medical support order consistent with the department's determination; and

(i) that the parties are entitled to a fair hearing under 40-5-226.

(3) If a support action is pending in district court and a temporary or permanent support obligation has not been ordered or if a paternity action is pending and there is clear and convincing evidence of paternity based on paternity blood tests or other evidence, the department may enter an order requiring a child's parent or parents to pay an amount each month for the temporary support of the child pending entry of a support order by the district court. The temporary support order must include a medical support order as required by 40-5-208.

(4) An action to establish a temporary support order must be commenced by serving a notice of temporary support obligation on the parent or parents. In addition to the statements required in subsection (2), the notice must include a statement that:

(a) a party may request a hearing to show that a temporary support obligation is inappropriate under the circumstances; and

(b) the temporary support order will terminate upon the entry of a final support order or an order of nonpaternity. If the final order is retroactive, any amount paid for a particular period under the temporary support order must be credited against the amounts due under the final order for the same period, but excess amounts may not be refunded. If an order of nonpaternity is issued or if the final support order states that periodic support obligation is not proper, the obligee shall refund to the obligor any improper amounts paid under the temporary support order, plus any costs that the obligor incurs in recovering the amount to be refunded.

(5) (a) If a temporary support order is entered or if proceedings are commenced under this section for a married obligor, the department shall vacate any support order or dismiss any proceeding under this part if it finds that the parties to the marriage have:

(i) reconciled without the marriage having been dissolved;

(ii) made joint application to the department to vacate the order or dismiss the proceeding; and

(iii) provided proof that the marriage has been resumed.

(b) The department may not vacate a support order or dismiss a proceeding under this subsection (5) if it determines that the rights of a third person or the child are affected. The department may issue a new notice of temporary support obligation under this section if the parties subsequently separate.

(6) A notice of financial responsibility and the notice of temporary support obligation may be served either by certified mail or in the manner prescribed for the service of a summons in a civil action in accordance with the Montana Rules of Civil Procedure.

(7) If prior to service of a notice under this section the department has sufficient financial information, the department's allegation of the obligor's monthly support

responsibility, whether temporary or final, must be based on the child support guidelines established under 40-5-214. If the information is unknown to the department, the allegations of the parent's or parents' monthly support responsibility must be based on the greater of:

(a) the maximum amount of public assistance that could be payable to the child under Title 53 if the child was otherwise eligible for assistance; or

(b) the child's actual need as alleged by the custodial parent, guardian, or caretaker of the child.

(8) (a) A party who objects to a notice of financial responsibility or notice of temporary support obligation may file a written request for a hearing with the department:

(i) within 20 days from the date of service of a notice of financial responsibility; and

(ii) within 10 days from the date of service of a notice of temporary support obligation.

(b) If the department receives a timely request for a hearing, it shall conduct one under 40-5-226.

(c) If the department does not receive a timely request for a hearing, it shall order the parent or parents to pay child support, if any, and to provide for the child's medical needs as stated in the notice. The child support obligation must be the amount stated in the notice or determined in accordance with the child support guidelines adopted under 40-5-209.

(9) If the department is unable to enter an obligation in accordance with the child support guidelines because of default of a party, the department may, upon notice to the parties to the original order, substitute a support order made in accordance with the guidelines for the defaulted order.

(10) After establishment of an order under this section, the department may initiate a subsequent action on the original order to establish a child support or medical support obligation for another child of the same parents.

(11) A child support and medical support order under subsection (1) is effective as of the date of service of a notice of financial responsibility on the parent or parents and may be collected by any remedy available to the department for the enforcement of child support obligations. A final order is retroactive to the date of service of the notice of financial responsibility as provided in this subsection, except that the final order may also determine child support for a prior period as provided in 40-5-226(3).

(12) A child support and medical support order under subsection (1) continues until the child reaches 18 years of age or until the child's graduation from high school, whichever occurs later, but not later than the child's 19th birthday, unless the child is sooner emancipated by court order. A temporary support obligation established under subsection (3) continues until terminated as provided in subsection (5) or until the temporary order is superseded by a final order, judgment, or decree.

History: En. Sec. 15, Ch. 612, L. 1979; amd. Sec. 44, Ch. 439, L. 1981; amd. Sec. 14, Ch. 549, L. 1989; amd. Sec. 5, Ch. 482, L. 1997; amd. Sec. 44, Ch. 552, L. 1997; amd. Sec. 73, Ch. 51, L. 1999; amd. Sec. 7, Ch. 579, L. 1999; amd. Sec. 1, Ch. 573, L. 2003; amd. Sec. 3, Ch. 431, L. 2005.

40-5-226. Administrative hearing -- nature -- place -- time -- determinations -- failure to appear -- entry of final decision and order. (1) The administrative hearing is

defined as a "contested case".

(2) If a hearing is requested, it must initially be conducted by teleconference methods and is subject to the Montana Administrative Procedure Act. At the request of a party or upon a showing that the party's case was substantially prejudiced by the lack of an in-person hearing, the hearings officer shall grant a de novo in-person hearing.

(3) The hearings officer shall determine the liability and responsibility, if any, of the parent or parents under the notice and shall enter a final decision and order in accordance with the determination. The order may award support from the date of:

(a) the child's birth if paternity was established under 40-5-231 through 40-5-238 or under Title 40, chapter 6, part 1, subject to the limitation in 40-6-108(3)(b);

(b) the parties' separation if support is initially established under 40-5-225; or

(c) notice to the parties of a support modification request under 40-5-273.

(4) (a) Except as provided in subsection (4)(b), if the parent or parents fail to appear at the hearing or to timely file a request for a hearing, the hearings officer, upon a showing of valid service, shall enter a default decision and order declaring the amount stated in the notice to be final.

(b) In a multiple party proceeding under 40-5-225, if one party files a timely request for hearing, the matter must be set for hearing. Notice of the hearing must be served on the parties. If a party refuses to appear for the hearing or participate in the proceedings, the hearings officer shall determine child support and medical support orders based on the notice, information available to the department, and evidence provided at the hearing by the appearing parties. A party's refusal to appear is a consent to entry of child and medical support orders consistent with the hearings officer's determination. However, the default order may not be for more than the support requested in the notice unless the hearings officer finds that the evidence requires a larger amount.

(5) In a hearing to determine financial responsibility, whether temporary or final, and in any proceeding to modify support under 40-5-272, 40-5-273, 40-5-277, and 40-5-278, the monthly support responsibility must be determined in accordance with the evidence presented and with reference to the uniform child support guidelines adopted by the department under 40-5-209. The hearings officer is not limited to the amounts stated in the notice. The guidelines must be used in all cases, including cases in which the order is entered upon the default of a party and those in which the order is entered upon the parties' consent. A verified representation of a defaulting parent's income, based on the best information available, may be used when a parent fails to provide financial information for use in applying the guidelines. The amount determined under the guidelines is presumed to be an adequate and reasonable support award, unless the hearings officer finds by clear and convincing evidence that the application of the guidelines is unjust to the child or to any of the parties or is inappropriate in a particular case. If the hearings officer finds that the guideline amount is unjust or inappropriate in a particular case, the hearings officer shall state the reasons for finding that the application of the guidelines is unjust to the child or a party or is inappropriate in that particular case. Similar findings must also be made in a case in which the parties have agreed to a support amount that varies from the guideline amount. The hearings officer may vary the application of the guidelines to limit the obligor's liability for past support to the proportion of expenses already incurred that the hearings officer considers just. Findings that rebut and vary the guideline amount must include a statement of the amount of

support that would have ordinarily been ordered under the guidelines.

(6) In a hearing to enforce a support order or to establish paternity under this chapter, the department shall send a copy of the notice of hearing to the obligee by regular mail addressed to the obligee's last-known address. The obligee may attend and observe the hearing as a nonparty. This subsection does not limit participation of an obligee who is a party to the proceedings or who is called as a witness to testify.

(7) (a) Within 60 days after the hearing has been concluded, any posthearing briefs are received, and all the evidence submitted, except for good cause, the hearings officer shall enter a final decision and order. The determination of the hearings officer constitutes a final agency decision, subject to judicial review under 40-5-253 and the provisions of the Montana Administrative Procedure Act. A copy of the final decision must be delivered or mailed to each party, each party's attorney, and the obligee if the obligee is not a party.

(b) A child support or medical support obligation established under this section is subject to the registration and processing provisions of part 9 of this chapter.

(8) A child support or medical support order entered under this part must contain a statement that the order is subject to review and modification by the department upon the request of the department or a party under 40-5-272, 40-5-273, 40-5-277, and 40-5-278 when the department is providing services under IV-D for the enforcement of the order.

(9) A support debt determined pursuant to this section is subject to collection action without further necessity of action by the hearings officer.

(10) A child support or medical support obligation determined under this part by reason of the obligor's failure to request a hearing under this part or failure to appear at a scheduled hearing may be vacated, upon the motion of an obligor, by the hearings officer within the time provided and upon a showing of any of the grounds enumerated in the Montana Rules of Civil Procedure. When issuing a support order, the department shall consider whether any of the exceptions to immediate income withholding found in 40-5-411 apply, and, if an exception is applicable, the department shall include the exception in the support order.

(11) (a) Unless the hearings officer makes a written exception under 40-5-315 or 40-5-411 and the exception is included in the support order, each order establishing a child support obligation, whether temporary or final, and each modification of an existing child support order under this part is enforceable by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 4. A support order that omits that provision or that provides for a payment arrangement inconsistent with this section is nevertheless subject to withholding for the payment of support without need for an amendment of the support order or for any further action by the hearings officer.

(b) If an obligor is excepted from paying support through income withholding, the support order must include a requirement that whenever a party to the case is receiving IV-D services, support payments must be paid through the department as provided in 40-5-909.

(12) (a) If the department establishes paternity or establishes or modifies a child support obligation, the department's order must include a provision requiring each party other than the department to promptly file with the department and to update, as necessary, information on:

(i) identity of the party;

[(ii) social security number;]

(iii) residential and mailing addresses;

(iv) telephone number;

(v) driver's license number;

(vi) name, address, and telephone number of employer; and

(vii) if the child is covered by a health or medical insurance plan, the name of the insurance carrier or health benefit plan, the policy identification number, the name of the persons covered, and any other pertinent information regarding coverage or, if the child is not covered, information as to the availability of coverage for the child through the obligor's and obligee's employer.

(b) The order must further direct that in a subsequent child support enforcement action, upon sufficient showing that diligent effort has been made to ascertain the location of the party, the department's due process requirements for notice and service of process are met with respect to the party upon delivery of written notice by regular mail to the most recent address of the party or the party's employer's address reported to the department.

(c) The department shall keep the information provided under subsection (12)(a) confidential except as necessary for purposes of Title IV-D of the Social Security Act.

(13) The hearings officer may:

(a) compel obedience to the hearings officer's orders, judgments, and process and to subpoenas and orders issued by the department, including income-withholding orders issued pursuant to 40-5-415;

(b) compel the attendance of witnesses at administrative hearings;

(c) compel obedience of subpoenas for paternity blood tests;

(d) compel the production of accounts, books, documents, and other evidence;

(e) punish for civil contempt. Contempt authority does not prevent the department from proceeding in accordance with the provisions of 2-4-104.

(f) compel the production of information requested by the department or another IV-D agency under 40-5-443.

(14) A contempt occurs whenever:

(a) a person acts in disobedience of any lawful order, judgment, or process of the hearings officer or of the department;

(b) a person compelled by subpoena to appear and testify at an administrative hearing or to appear for genetic paternity tests fails to do so;

(c) a person compelled by subpoena *duces tecum* to produce evidence at an administrative hearing fails to do so;

(d) an obligor or obligee subject to a discovery order issued by the hearings officer fails to comply with discovery requests;

(e) a person or entity compelled by administrative subpoena from the department or another IV-D agency to produce financial information or other information needed to establish paternity or to establish, modify, or enforce a support order fails to do so;

(f) a payor under an order to withhold issued pursuant to 40-5-415 fails to comply with the provisions of the order. In the case of a payor under an income-withholding order, a separate contempt occurs each time that income is required to be withheld and paid to the department and the payor fails to take the required action.

(g) a payor or labor union fails to provide information to the department or another IV-D agency when requested under 40-5-443[; or]

[(h) a financial institution uses information provided by the department pursuant to 40-5-924 for any other purpose without the authorization of the department].

(15) Before initiating a contempt proceeding, the department shall give the alleged contemnor notice by personal service or certified mail of the alleged infraction and a reasonable opportunity to comply with the law and to cure the alleged infraction. In order to initiate a contempt proceeding, an affidavit of the facts constituting a contempt must be submitted to the hearings officer, who shall review it to determine whether there is cause to believe that a contempt has been committed. If cause is found, the hearings officer shall issue a citation requiring the alleged contemnor to appear and show cause why the alleged contemnor should not be determined to be in contempt and required to pay a penalty of not more than $500 for each count of contempt. The citation, along with a copy of the affidavit, must be served upon the alleged contemnor either by personal service or by certified mail. All other interested persons may be served a copy of the citation by first-class mail.

(16) At the time and date set for hearing, the hearings officer shall proceed to hear witnesses and take evidence regarding the alleged contempt and any defenses to the contempt. If the alleged contemnor fails to appear for the hearing, the hearing may proceed in the alleged contemnor's absence. If the hearings officer finds the alleged contemnor in contempt, the hearings officer may impose a penalty of not more than $500 for each count found. The hearings officer's decision constitutes a final agency decision, subject to judicial review under 40-5-253 and subject to the provisions of Title 2, chapter 4.

(17) An amount imposed as a penalty may be collected by any remedy available to the department for the enforcement of child support obligations, including warrant for distraint pursuant to 40-5-247, income withholding pursuant to Title 40, chapter 5, part 4, and state debt offset, pursuant to Title 17, chapter 4, part 1. The department may retain any penalties collected under this section to offset the costs of administrative hearings conducted under this chapter.

(18) The penalties charged and collected under this section must be paid into the state treasury to the credit of the child support enforcement division special revenue fund and must be accompanied by a detailed statement of the amounts collected. *(Bracketed language terminates on occurrence of contingency--sec. 1, Ch. 27, L. 1999.)*

History: En. Sec. 16, Ch. 612, L. 1979; amd. Sec. 45, Ch. 439, L. 1981; amd. Sec. 15, Ch. 549, L. 1989; amd. Sec. 6, Ch. 266, L. 1991; amd. Sec. 3, Ch. 635, L. 1991; amd. Sec. 3, Ch. 294, L. 1993; amd. Sec. 54, Ch. 328, L. 1993; amd. Sec. 14, Ch. 631, L. 1993; amd. Sec. 5, Ch. 264, L. 1995; amd. Sec. 6, Ch. 482, L. 1997; amd. Secs. 45, 100, Ch. 552, L. 1997; amd. Sec. 2, Ch. 542, L. 2001; amd. Sec. 5, Ch. 21, L. 2005; amd. Sec. 4, Ch. 431, L. 2005; amd. Sec. 2, Ch. 564, L. 2005.

40-5-227. Filing and docketing of final orders -- orders effective as district court decrees. (1) An abstract of any final administrative order under this chapter may be filed in the office of the clerk of the district court of any county of Montana. Upon the request of the department, the order must be docketed in the judgment docket of the district court. The properly filed and docketed order has all the force, effect, and attributes of a docketed order or decree of the district court, including but not limited to lien effect and enforceability by supplemental proceedings, writs of execution, and contempt of court proceedings. A final administrative order of the department is effective and enforceable

without filing and docketing the order in the district court. Contempt of court proceedings and writs of execution based on the administrative order may not be requested from the district court unless the administrative order is first docketed with the district court. The administrative order may not operate as a judgment lien, unless the order is first docketed with the district court or a lien is otherwise perfected under the laws of this state, including 40-5-248.

(2) A final administrative order that determines and sets periodic support payments in the absence of a district court order, when filed and docketed under this section, may be modified by a district court order only as to installments accruing after actual notice to the parties of any motion for modification. The standard for a modification is that set forth in 40-4-208.

(3) The department may issue a warrant for distraint based upon a properly filed and docketed order pursuant to 40-5-247.

40-5-232. Establishment of paternity -- notice of parental responsibility -- contents. (1) When the paternity of a child has not been legally established under the provisions of Title 40, chapter 6, part 1, or otherwise, the department may proceed to establish paternity under the provisions of 40-5-231 through 40-5-237. An administrative hearing held under the provisions of 40-5-231 through 40-5-237 is a contested case within the meaning of 2-4-102 and is subject to the provisions of Title 2, chapter 4, except as otherwise provided in 40-5-231 through 40-5-237.

(2) It is presumed to be in the best interest of a child to legally determine and establish paternity. A presumption under this subsection may be rebutted by a preponderance of the evidence.

(3) In a proceeding under 40-5-231 through 40-5-237, if an alleged father consents in writing to entry of an order declaring the alleged father to be the legal father of a child, the department may enter an order establishing legal paternity. As a part of a consent to entry of an order declaring paternity, the department shall provide information to the parents regarding the rights and responsibilities of an alleged father consenting to entry of an order declaring paternity. A consent to entry of an order declaring paternity is binding on a parent who executes it, whether or not the parent is a minor.

(4) Full faith and credit must be given to a determination of paternity made by any other state, whether presumed by law, established through voluntary acknowledgment, or established by administrative or judicial processes.

(5) The department shall commence proceedings to establish paternity by serving on an alleged father a notice of parental responsibility. The department may not serve the notice unless it has:

(a) a sworn statement claiming that the alleged father is the child's natural father;

(b) evidence of the existence of a presumption of paternity under 40-6-105; or

(c) any other reasonable cause to believe that the alleged father is the child's natural father.

(6) Regardless of whether the department has grounds to or intends to commence a paternity proceeding against the alleged father, when the child support enforcement division in a case under Title IV-D of the Social Security Act receives a written claim from a child's mother that names a person as the alleged natural father of the child, the

department shall promptly take reasonable steps to locate and notify the alleged father of the existence of the claim. The notification must be given to the alleged father in a manner that places the demands of individual privacy above the merits of public disclosure. The notification must include the name of the mother and the date of birth or the projected date of birth if the child has not yet been born.

(7) Service on the alleged father of the notice of parental responsibility must be made as provided in 40-5-231(2). The notice must include:

(a) an allegation that the alleged father is the natural father of the child involved;

(b) the child's name and place and date of birth;

(c) the name of the child's mother and the name of the person or agency having custody of the child, if other than the mother;

(d) the probable time or period of time during which conception took place;

(e) a statement that if the alleged father fails to timely deny the allegation of paternity, the question of paternity may be resolved against the alleged father without further notice;

(f) a statement that if the alleged father timely denies the allegation of paternity:

(i) the alleged father is subject to compulsory paternity blood testing;

(ii) a paternity blood test may result in a presumption of paternity; and

(iii) upon receipt of the paternity blood test results, if the alleged father continues to deny paternity, the alleged father may request the department to refer the matter to district court for a determination of paternity.

(8) The alleged father may file a written denial of paternity with the department within 20 days after service of the notice of parental responsibility.

(9) When there is more than one alleged father of a child, the department may serve a notice of parental responsibility on each alleged father in the same consolidated proceeding or in separate proceedings. Failure to serve notice on an alleged father does not prevent the department from serving notice on any other alleged father of the same child.

History: En. Sec. 3, Ch. 119, L. 1989; amd. Sec. 16, Ch. 631, L. 1993; amd. Sec. 1, Ch. 70, L. 1995; amd. Sec. 1, Ch. 398, L. 1997; amd. Sec. 47, Ch. 552, L. 1997.

40-5-233. Establishment of paternity -- administrative hearing -- subpoena -- compulsory blood testing. (1) (a) Paternity blood testing may be requested by the alleged father, the mother, or the child through the child's custodian and may be made in conjunction with or in addition to a notice the department issues under 40-5-232. The request must be in writing and must be supported by a sworn statement of the requester that includes:

(i) an allegation of paternity and sufficient facts to establish a reasonable probability that the alleged father engaged in an act with the child's mother during the probable time of the child's conception that could have resulted in the child's conception; or

(ii) a denial of paternity and sufficient facts to establish a reasonable probability of the nonexistence of contact between the alleged father and the child's mother that could have resulted in the child's conception.

(b) If the department determines after a review of a sworn statement that there are sufficient facts to establish a reasonable probability of paternity or nonpaternity as claimed by the requesting party, the department shall issue a subpoena ordering the

alleged father, the mother, or the child through the child's custodian to submit to blood testing.

(c) A pending request for blood testing under this section does not prevent the department from issuing a notice of parental responsibility under 40-5-232.

(d) Denial of a request for paternity blood testing under this subsection (1) is not a finding of nonpaternity and does not prevent the issuance of a notice under 40-5-232. A denial does not affect the completion of any pending action initiated under 40-5-232.

(2) (a) The department may order an alleged father to appear for an administrative hearing when:

(i) the department determines that the sworn statement provided in subsection (1) does not contain sufficient facts to issue a blood test subpoena and that additional examination of witnesses or evidence is necessary; or

(ii) the department receives a timely filed written denial of paternity in response to a notice under 40-5-232.

(b) The hearing must initially be conducted by teleconferencing methods and is subject to the provisions of the Montana Administrative Procedure Act. At the request of a party, the hearings officer shall, at the close of a teleconference hearing, grant a de novo in-person hearing.

(c) The department may issue a subpoena ordering the alleged father to submit to paternity blood testing if the testimony and other supplementary evidence demonstrate a reasonable probability:

(i) that the alleged father engaged in an act with the child's mother during the probable time of the child's conception that could have resulted in the child's conception; or

(ii) when the alleged father's paternity is presumed under 40-6-105, of the nonexistence of contact between the alleged father and the child's mother that could have resulted in the child's conception.

(d) For the purposes of this subsection (2), a reasonable probability of an act during the possible time of conception may be established by affidavit of the child's mother without need for the mother to appear at the hearing.

(3) Previous paternity actions under this part that did not result in a subpoena for paternity blood testing do not prevent the department from recommencing a paternity action if the department believes it can establish any of the factors listed in subsection (2)(c) or (2)(d).

(4) When there is reasonable cause to suggest that a blood test sample of a person submitting to a blood test was not the sample of the alleged father, mother, or child, an additional hearing may be held. The scope of the hearing is limited to questions involving the blood drawing or the chain of custody at the blood drawing site. The hearings officer may order retesting of any party.

(5) If the department does not receive a timely filed written denial of paternity or if an alleged father fails to appear at a scheduled hearing or for a scheduled paternity blood test, the department may enter an order declaring the alleged father the legal father of the child. The order will take effect within 10 days after entry of the default unless the alleged father before the 10th day presents good cause for failure to make a timely denial or for failure to appear at the hearing or to undergo paternity blood testing. The department may not enter an order under this section if there is more than one alleged father unless the default applies to only one of them and all others have been excluded by

the results of paternity blood testing. An order issued under the provisions of this section may be set aside as provided in 40-5-235(3).

(6) If the rights of others and the interests of justice so require, the department may apply to any district court under the provisions of 2-4-104 for an order compelling an alleged father to submit to paternity blood testing. The court shall hear the matter as expeditiously as possible. If the court finds reasonable cause to believe that the alleged father is the natural or presumed father of the child, the court shall enter an order compelling the alleged father to submit to a paternity blood test. Reasonable cause may be established by affidavit of the child's mother.

History: En. Sec. 4, Ch. 119, L. 1989; amd. Sec. 2, Ch. 70, L. 1995; amd. Sec. 48, Ch. 552, L. 1997.

40-5-236. *(Temporary)* Referral of paternity issue to district court -- record -- parties -- exclusion of other matters -- fees. (1) If the scientific evidence resulting from a paternity blood test does not exclude the alleged father and the alleged father continues to deny paternity, the alleged father shall file a written objection with the department within 20 days after service of the paternity blood test results specifically requesting referral of the paternity issue to the district court. Upon receipt of the written objection, the department shall refer the matter to the district court for a determination based on the contents of the administrative hearing record and any further evidence that may be produced at trial. Except as otherwise provided in 40-5-231 through 40-5-237, proceedings in the district court must be conducted pursuant to Title 40, chapter 6, part 1.

(2) The administrative record must include:

(a) a copy of the notice of parental responsibility and the return of service of the notice;

(b) the alleged father's written denial of paternity, if any;

(c) the transcript of the administrative hearing;

(d) the paternity blood test results and any report of an expert based on the results; and

(e) any other relevant information.

(3) Upon filing of the record with the district court, the court acquires jurisdiction over the parties as if they had been served with a summons and complaint. The department shall serve written notice upon the alleged father, as provided in 40-5-231(2), that the issue of paternity has been referred to the district court for determination.

(4) In a proceeding in the district court, the department shall appear on the issue of paternity only. The court may not appoint a guardian ad litem for the child unless the court in its discretion determines that an appointment is necessary and in the best interest of the child. Neither the mother nor the child is a necessary party, but either may testify as a witness.

(5) No other matter may be joined with an action to determine the existence or nonexistence of the parent and child relationship under this section. The parties shall institute an independent action to address other issues, including visitation and custody.

(6) Except as provided in 25-10-711, the department is not liable for attorney fees, including fees for attorneys appointed under 40-6-119, or fees of a guardian ad litem appointed under 40-6-110.

40-5-236. ***(Effective July 1, 2006)*****. Referral of paternity issue to district court -- record -- parties -- exclusion of other matters -- fees.** (1) If the scientific evidence resulting from a paternity blood test does not exclude the alleged father and the alleged father continues to deny paternity, the alleged father shall file a written objection with the department within 20 days after service of the paternity blood test results specifically requesting referral of the paternity issue to the district court. Upon receipt of the written objection, the department shall refer the matter to the district court for a determination based on the contents of the administrative hearing record and any further evidence that may be produced at trial. Except as otherwise provided in 40-5-231 through 40-5-237, proceedings in the district court must be conducted pursuant to Title 40, chapter 6, part 1.

(2) The administrative record must include:

(a) a copy of the notice of parental responsibility and the return of service of the notice;

(b) the alleged father's written denial of paternity, if any;

(c) the transcript of the administrative hearing;

(d) the paternity blood test results and any report of an expert based on the results; and

(e) any other relevant information.

(3) Upon filing of the record with the district court, the court acquires jurisdiction over the parties as if they had been served with a summons and complaint. The department shall serve written notice upon the alleged father, as provided in 40-5-231(2), that the issue of paternity has been referred to the district court for determination.

(4) In a proceeding in the district court, the department shall appear on the issue of paternity only. The court may not appoint a guardian ad litem for the child unless the court in its discretion determines that an appointment is necessary and in the best interest of the child. Neither the mother nor the child is a necessary party, but either may testify as a witness.

(5) No other matter may be joined with an action to determine the existence or nonexistence of the parent and child relationship under this section. The parties shall institute an independent action to address other issues, including visitation and custody.

(6) Except as provided in 25-10-711, the department is not liable for attorney fees, including fees for attorneys assigned under 40-6-119, or fees of a guardian ad litem appointed under 40-6-110.

History: En. Sec. 7, Ch. 119, L. 1989; amd. Sec. 4, Ch. 70, L. 1995; amd. Sec. 8, Ch. 482, L. 1997; amd. Sec. 50, Ch. 552, L. 1997; amd. Sec. 27, Ch. 449, L. 2005.

40-5-272. Application for review of child support orders. (1) Upon the application of the department, the obligor, or the obligee, a support order issued by a district court of this state or by a court or administrative agency of another state or a previously issued administrative support order of this state may be reviewed by the department to determine whether the support order should be modified in accordance with the guidelines.

(2) Jurisdiction to conduct the review and to issue a modifying order under 40-5-273, 40-5-277, and 40-5-278 is authorized when:

(a) the obligor and the obligee reside in this state; or

(b) jurisdiction can be obtained as provided under 40-5-231.

(3) Jurisdiction to review a child support order under this section does not confer

jurisdiction for any other purpose, such as custody or visitation disputes.

(4) Criteria constituting sufficient grounds for review of a child support order include:

(a) a substantial change in circumstances as defined by administrative rules;

(b) the need to provide for the child's health care needs, regardless of the availability of health insurance coverage through employment or other group insurance;

(c) a lapse of 36 months from the date that:

(i) the order was entered;

(ii) an administrative hearing was granted under 40-5-277; or

(iii) an administrative order was issued denying a modification because of the applicant's failure to meet one of the criteria described in this subsection (4); or

(d) a change in custody of the child.

(5) A party may withdraw the party's request for modification prior to the issuance of the notice described in 40-5-273. After the issuance of the notice, if a party withdraws a request for modification, the nonrequesting party may continue the modification action by filing with the department a written request to continue.

(6) The department shall make available procedures and forms that allow the obligor or the obligee to complete the review process without legal counsel.

(7) To the extent that they are consistent with this section, the provisions of 40-5-145, 40-5-149, and 40-5-150 apply to this section.

History: En. Sec. 2, Ch. 266, L. 1991; amd. Sec. 50, Ch. 328, L. 1993; amd. Sec. 3, Ch. 542, L. 2001; amd. Sec. 6, Ch. 564, L. 2005.

40-5-273. Notice of review of child support orders -- order for production of information. (1) Upon receipt of a review application setting forth facts meeting any of the criteria for review of a child support order established in 40-5-272, a notice of administrative review and an order for the production of financial information, if appropriate, must be served either personally or by certified mail on the obligor, the obligee, and any other party entitled to notice. If service is by certified mail, the department must receive a return receipt signed by the person to whom the notice was mailed for the service to be effective. Service of the notice is considered to be effective if, in the absence of a return receipt, the person to whom the notice was mailed requests a hearing or appears at the administrative review hearing. The notice must include a statement:

(a) of the purpose, objectives, and possible consequences of the review, including that a modified support order may require the obligee to pay a monthly transfer payment to another party;

(b) of the right of the obligor and the obligee to request the department to issue subpoenas compelling the appearance of witnesses and the production of documents for a hearing;

(c) of the dollar amount of the support obligation to be paid each month for the child;

(d) of any change in the child's medical support needs, including changes to the original order to bring it into compliance with part 8 of this chapter;

(e) of the effective date of the change in the child support or medical support obligation;

(f) of the right of any party to request a hearing to contest the amount of child support alleged in the notice or to contest the imposition or modification of a medical support

order;

(g) that if a party does not timely file a request for a hearing, support, including medical support, will be ordered as declared in the notice or in accordance with the child support guidelines adopted under 40-5-209;

(h) that if a party requests a hearing, the other parties may refuse to participate in the proceedings and that the child support and medical support order will be determined using the information available to the department or provided at the hearing;

(i) that a party's refusal to participate is a consent to entry of a child support and medical support order consistent with the department's determination; and

(j) that the parties are entitled to a fair hearing under 40-5-277.

(2) An order for the production of financial information may be incorporated into the review notice and must include a statement that:

(a) the financial information must be returned no later than the 20th day after the date the order is served;

(b) if the requested information is not returned as required, the department may:

(i) proceed with the review using the information available to the department;

(ii) cease all proceedings for the review;

(iii) initiate contempt proceedings in accordance with 40-5-226; or

(iv) apply to the district court for an order to compel compliance with the order for production of financial information in accordance with 2-4-104; and

(c) any information required by the order must be provided to the department and other parties prior to the review hearing.

(3) If, in the absence of a certified mail return receipt showing the date of service, a person requests a hearing, any financial information ordered produced pursuant to subsection (2) must be provided to the department no later than the 20th day after the person requests the hearing, unless the person requesting the hearing waives that date in writing. A person who waives that date in writing shall provide the financial information by the date provided in subsection (2) or by another date established by order of the department.

(4) If additional discovery is requested by a party, the hearings officer may issue subpoenas ordering other parties to produce information in the party's possession about the obligor and the obligee that may be reasonably necessary for application of the guidelines.

History: En. Sec. 3, Ch. 266, L. 1991; amd. Sec. 10, Ch. 482, L. 1997; amd. Sec. 55, Ch. 552, L. 1997; amd. Sec. 74, Ch. 51, L. 1999; amd. Sec. 10, Ch. 579, L. 1999; amd. Sec. 12, Ch. 352, L. 2001; amd. Sec. 4, Ch. 542, L. 2001; amd. Sec. 7, Ch. 564, L. 2005.

40-5-277. Administrative review hearing -- final order -- court approval of order. (1) Upon receipt of a timely request for hearing from a party, the department shall schedule an administrative hearing. The hearing is a contested case as defined in 2-4-102 and must initially be conducted by teleconferencing methods. At the request of a party or upon a showing that the party's case was substantially prejudiced by the lack of an in-person hearing, the department shall grant a de novo in-person hearing. The hearing is subject to Title 2, chapter 4, and 40-5-253, except as otherwise provided in 40-5-272, 40-5-273, 40-5-277, and 40-5-278.

(2) In addition to the powers and duties provided by other law, to ensure the equitable

determination of a support obligation, during a review hearing the department shall:

(a) question witnesses in a nonadversarial manner to elicit full disclosure of all pertinent facts in dispute;

(b) hear evidence submitted by the parties and rule on its admissibility; and

(c) apply the guidelines to the facts agreed upon and to those determined at the hearing on disputed matters.

(3) The hearings officer shall determine the liability and responsibility, if any, of the parent or parents under the notice. The monthly support obligation must be determined with reference to the child support guidelines adopted by the department under 40-5-209. The hearings officer is not limited to the amounts stated in the notice. The guidelines must be used in all cases, including cases in which the order is entered upon the default of a party and those in which the order is entered upon the parties' consent. A verified representation of a defaulting parent's income and financial condition, based on the best information available, may be used when a parent fails to provide financial information for use in applying the guidelines. The amount determined under the guidelines is presumed to be an adequate and reasonable award unless the hearings officer finds by clear and convincing evidence that the application of the guidelines is unjust to the child or to any of the parties or is inappropriate in a particular case. If the hearings officer finds that the guideline amount is unjust or inappropriate in a particular case, the hearings officer shall state the reasons for finding that the application is unjust or inappropriate. Similar findings must also be made in a case in which the parties have agreed to a support amount that varies from the guideline amount. Findings that rebut and vary the guideline amount must include a statement of the amount of support that would have ordinarily been ordered under the guidelines.

(4) If the department determines that the difference between the existing support order and the amount determined under the guidelines is negligible under rules issued by the department, the modified support order may not change the amount of the support obligation. Regardless of the amount of the support order, the department may determine that an order for the provision of health insurance is appropriate.

(5) The department shall consider whether or not health insurance for the child is available and make an appropriate order in accordance with part 8 of this chapter for the provision of the child's health insurance.

(6) In addition to complying with other requirements of law, the modified support order must include the following notices and warnings:

(a) that the parties keep the department informed of the name and address of the obligor's current employer and information on health insurance available to the parties through employment or other group insurance; and

(b) that the modified order is subject to future administrative review and modification by the department upon the request of the department or a party under this part when the department is providing services under Title IV-D of the Social Security Act.

(7) Except as provided in subsection (8), an order entered under this section:

(a) is a final agency decision and is subject to judicial review pursuant to the Montana Administrative Procedure Act; and

(b) must notify the parties that the order is subject to judicial review under Title 2, chapter 4, part 7, and 40-5-253.

(8) (a) An administrative modified support order issued under this section that

modifies a support order entered by a Montana court or a court of another jurisdiction is not effective as a final order until the modified order is filed with and approved by the court that entered the order if that order was entered by a Montana district court. If the order was entered by a court of another jurisdiction, the order must be filed with and approved by a Montana district court that is an appropriate court under the Montana laws or rules of court governing jurisdiction and venue in civil proceedings. The department shall file the proposed modified order with the appropriate court under the Montana laws or rules of court governing jurisdiction and venue in civil proceedings and shall serve the order on the parties and their counsel of record in the administrative and court proceedings by mail or personal service in accordance with Rule 5 of the Montana Rules of Civil Procedure. Service is complete upon mailing to the last-known address of the parties and counsel of record.

(b) A party may file a written objection to an administrative modified support order proposed by the department under this section with the court within 20 days after service of a copy of the order on the party. The court shall set a date for a hearing on the objection to the proposed order. If an objection is not filed, the court may without further notice enter its order.

(c) The court may adopt an administrative modified support order proposed under this section, modify it, reject it, or remand it to the department with instructions for further hearing. Service of the court order must be in accordance with Rule 5 of the Montana Rules of Civil Procedure. If the court modifies a proposed administrative modified support order proposed under this section without a hearing, a party may file an objection to the court's modification within 10 days of service of the court's order on the party. If an objection is filed, the court shall set a date for hearing the objection and shall enter its final order after the hearing.

History: En. Sec. 6, Ch. 542, L. 2001; amd. Sec. 8, Ch. 564, L. 2005

40-5-278. Limited review of support order. A party may apply for a limited review to address a specific change that occurred after a support order was entered, that is not caused by an increase or decrease in a party's annual net income, and that may have other effects on the existing support order. It is presumed that all other facts relative to the existing support order, including income and deductions from income, remain unchanged. Information gathered is limited to that which is necessary to verify the change, the value of the change, and the expected duration of the change. The department's recommendation must be limited to whether the value of the change should be added to or subtracted from the amount of the existing support order. If a more detailed modification is required in a case presented for limited review, the case becomes subject to the requirements of 40-5-277. The circumstances in which a limited review process is available are confined to cases in which:

(1) there is a change in parenting time or residence of a child and a modified support order has not been entered as a result of the change;

(2) a child's need for day-care services has increased or decreased and the increase or decrease is expected to continue for at least 18 months;

(3) a child has developed special needs that did not exist when the existing support order was issued and the needs are expected to continue for at least 18 months or a

special need considered in the support order no longer exists;

(4) the cost of health insurance coverage for a child provided by a parent has increased or decreased by 25% of the support order and the increase or decrease is expected to continue for at least 18 months;

(5) there has been the birth of another child to the parties and the child's needs are to be added to the existing support order; or

(6) a child has reached the age of majority, become emancipated, married, entered military service, or died.

History: En. Sec. 7, Ch. 542, L. 2001.

40-5-414. Hearing. (1) (a) To contest the withholding of income initiated because of a delinquency or the modification of an existing order to withhold, an obligor may within 10 days of being served with notice of income withholding under 40-5-413 file with the department a written request for an administrative hearing to be held pursuant to the contested case provisions of Title 2, chapter 4, part 6.

(b) The obligor shall include with the hearing request a statement of one or more of the grounds for contesting income withholding provided in 40-5-412. If the hearing request fails to include that statement, the hearings officer may deny the hearing for failure to state an issue upon which a hearing may be granted.

(2) Venue for the administrative hearing may be in the county where the obligor resides if the obligor resides in this state, the county in which the payor or the payor's agent is located, or the county in which the department or any of its regional offices is located.

(3) The hearing must initially be held by teleconferencing methods and is subject to the Montana Administrative Procedure Act. At the request of a party, the hearings officer shall grant a de novo in-person hearing.

(4) If the obligor files a timely request for a hearing:

(a) that includes a statement showing a probable mistake of fact, the initiation of delinquency income withholding by the department and the modification of an existing withholding order may be stayed upon written request of the obligor until conclusion of the hearing or the date of the hearing if the obligor fails to appear at the scheduled hearing. However, if the obligor is only contesting an arrearage amount and is not contesting withholding for current support, income withholding for current support is not stayed. In a proceeding to modify an existing order, income withholding under the existing order to withhold is not stayed.

(b) unless good cause is found, the department shall, within 60 days of receipt of a request for a hearing, conduct a hearing. Unless good cause is found, within 60 days after a hearing is held, any posthearing briefs are received, and all evidence has been provided to the department concerning a notice of intent to withhold income, the department shall inform the obligor whether income withholding must take place.

(5) The department may continue an order to withhold income issued because of a delinquency, may modify an existing order to withhold income, or may issue an order to withhold income if:

(a) the obligor fails to file a timely written request for hearing that includes the statement showing a mistake of fact;

(b) the obligor fails to appear at a scheduled hearing;

(c) the hearings examiner determines from the evidence that the obligor is delinquent in the payment of support;

(d) there is an existing order to withhold and if the hearings examiner determines from the evidence that the obligor owes new or additional amounts in arrears; or

(e) in cases in which income withholding is being initiated at the request of an obligee without regard to whether there is an arrearage, the hearings examiner determines from the evidence that the obligor did not meet the terms of the alternative arrangement.

(6) For purposes of the hearing process, arrearages of support must be computed on the basis of the amount owed and unpaid on the date on which the obligor became delinquent. When income withholding is initiated because of a delinquency, payment of the arrearage after service of the notice or after service of an order to withhold on a payor is not a basis for not initiating or continuing income withholding. Whenever the notice of income withholding is issued because an arrearage has accrued or additional income is being withheld to satisfy additional arrearages, unless good cause is found, within 60 days after a hearing is held, any posthearing briefs are received, and all evidence has been provided, the department shall inform the obligor whether income withholding must take place.

(7) If the obligor fails to request a hearing within 10 days after service of the notice of income withholding or fails to appear at a scheduled hearing or if the hearings examiner determines that the obligor owes unpaid support or determines that a modification of an existing order is proper, the department shall issue an order to withhold income in accordance with 40-5-415.

History: En. Sec. 7, Ch. 571, L. 1985; amd. Sec. 11, Ch. 702, L. 1989; amd. Sec. 10, Ch. 635, L. 1991; amd. Sec. 12, Ch. 60, L. 1995; amd. Sec. 13, Ch. 482, L. 1997; amd. Secs. 74, 100, Ch. 552, L. 1997.

40-4-208. Modification and termination of provisions for maintenance, support, and property disposition. (1) Except as otherwise provided in 40-4-201(6), a decree may be modified by a court as to maintenance or support only as to installments accruing subsequent to actual notice to the parties of the motion for modification.

(2) (a) Except as provided in 40-4-251 through 40-4-258, whenever the decree proposed for modification does not contain provisions relating to maintenance or support, modification under subsection (1) may only be made within 2 years of the date of the decree.

(b) Except as provided in 40-4-251 through 40-4-258, whenever the decree proposed for modification contains provisions relating to maintenance or support, modification under subsection (1) may only be made:

(i) upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable;

(ii) upon written consent of the parties; or

(iii) upon application by the department of public health and human services, whenever the department of public health and human services is providing services under Title IV-D of the federal Social Security Act. The support obligation must be modified, as appropriate, in accordance with the guidelines promulgated under 40-5-209. Except as provided in 40-4-251 through 40-4-258, a modification under this subsection may not be made within 12 months after the establishment of the order or the most recent

modification.

(c) The nonexistence of a medical support order, as defined in 40-5-804, or a violation of a medical support order justifies an immediate modification of child support in order to:

(i) provide for the actual or anticipated costs of the child's medical care;

(ii) provide or maintain a health benefit plan or individual health insurance coverage for the child; or

(iii) eliminate any credit for a medical support obligation when it has been permitted or used as a credit in the determination of the child support obligation.

(3) The provisions as to property disposition may not be revoked or modified by a court except:

(a) upon written consent of the parties; or

(b) if the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(4) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

(5) Provisions for the support of a child are terminated by emancipation of the child or the child's graduation from high school if the child is enrolled in high school, whichever occurs later, but in no event later than the child's 19th birthday, unless the termination date is extended or knowingly waived by written agreement or by an express provision of the decree. Provisions for the support of a child do not terminate upon the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump-sum payment, to the extent just and appropriate in the circumstances.

(6) The decree may be modified, as provided in 40-4-251 through 40-4-258, for failure to disclose assets and liabilities.

History: En. 48-330 by Sec. 30, Ch. 536, L. 1975; R.C.M. 1947, 48-330; amd. Sec. 1, Ch. 464, L. 1979; amd. Sec. 1, Ch. 212, L. 1987; amd. Sec. 27, Ch. 549, L. 1989; amd. Sec. 28, Ch. 702, L. 1989; amd. Sec. 1, Ch. 342, L. 1991; amd. Sec. 28, Ch. 504, L. 1995; amd. Sec. 120, Ch. 546, L. 1995; amd. Sec. 10, Ch. 326, L. 1997.

Selected Administrative Rules of Montana

37.62.909 CONTESTED CASE PROCEEDINGS, ANSWER OR RESPONSE AND REQUEST FOR HEARING (1) Contested cases are initiated by service of a notice as provided in the Montana Administrative Procedure Act, applicable sections of Title 40, chapter 5, MCA and 17-4-105, MCA. Absent service of such notice there is no contested case, no jurisdiction and no corresponding right to an administrative hearing.

(2) A person served with a contested case notice may request an administrative hearing as provided in (5). Except as provided in (3) and (4), no additional answer or responsive pleading to any contested case notice is required.

(3) When the contested case notice is to initiate income withholding proceedings under 40-5-412 and 40-5-414, MCA, any request for hearing must allege a mistake of

fact. If a mistake of fact is not alleged, the request for hearing may be denied. Notwithstanding the omission of a mistake of fact, a person may be entitled to a hearing for the purpose of contesting the jurisdiction of the CSED to withhold the person's income.

(4) When requesting a hearing, the person must include with the request a brief statement of any affirmative defense the party may have to the contested case notice.

(5) To request a hearing, the person must:

(a) make the request in writing; and

(b) within the time permitted by statute or these rules for requesting the hearing, file the request with the OALJ as provided in ARM 37.62.911.

(6) In addition to the provisions of (4) through (5) (b), the written request must include the name, mailing address and telephone number at which the person requesting the hearing can be reached for service of subsequent documents and orders.

(7) The CSED will make hearing request forms consistent with this rule available for use by persons requesting a hearing. Except for a request for hearing that omits a mistake of fact required by (3), a timely request for hearing that is generally in compliance with this rule shall not be dismissed solely for failure to strictly satisfy the requirements of this rule.

(8) A request for hearing is not deemed made until a written request is actually received by the OALJ. The OALJ shall deny untimely requests for hearing.

(9) Informal contact with the CSED or OALJ, whether written or oral, will not constitute a hearing request, and will not extend the time in which a hearing must be requested.

37.62.913 PARTIES

1) Except as provided in (3), a party includes any person served with a CSED contested case notice.

(2) As the entity initiating the proceedings, the CSED is automatically a party in all contested case proceedings. However, the CSED, at its discretion, may limit its participation in the case. When the CSED does participate as a party, it will do so through a CSED caseworker or CSED attorney as provided in ARM 37.62.915.

(3) An interested person who receives an informational copy of the contested case notice is not a party.

37.62.915 REPRESENTATION

. . . .

(4) Through the use of pre-approved legal forms and written CSED policies and procedures, and under the ultimate direction of and in consultation with a CSED attorney, and consistent with rules 5.3 and 5.5 of the Montana Rules of Professional Conduct, a CSED caseworker may initiate, appear in and participate in a contested case. A caseworker's assertion in a contested case notice is sufficient to constitute the caseworker's authority to participate in the case. When in a particular case a mailing, service, or other communication with the CSED is required by these rules, the mailing, service or other communication must be directed to the participating caseworker.

(5) At the discretion of the CSED, a CSED attorney may personally appear and take an active role in a contested case at any phase in the proceedings. The CSED attorney may also cease taking an active role at any time. When a CSED attorney does appear in the case, the attorney will not need to file a notice of appearance or sign any pleading as provided in (1) (b). The CSED attorney's appearance is sufficient to establish the attorney's authority to provide counsel and representation. When requested by a CSED attorney appearing in the case, all other parties shall direct all further communication, mailings and notices made in that case to the attorney.

37.62.919 NOTICE OF HEARING, SCHEDULING ORDER AND LOCATION OF HEARING (1) If a request for hearing is timely and properly filed according to these rules, the OALJ shall assign the case to an ALJ and schedule a time, date and place for the conduct of the hearing. The OALJ shall serve a notice of hearing and scheduling order on all parties. In support enforcement, paternity establishment, and support order establishment cases where the obligee is not a party, the OALJ shall also send a copy of the notice of hearing to the obligee. In those instances, the obligee is not a party to those proceedings but may attend as a nonparty observer or witness.

(2) The notice of hearing and scheduling order shall:

(a) set the date, time and place for the hearing;

(b) set the date by which the witness and exhibit list must be filed with the OALJ and by which a copy of the list must be served on all other parties;

(c) set the date by which exhibits must be exchanged with other parties if exhibits are not served as attachments to the witness and exhibit list;

(d) set the date by which a party must request discovery or request subpoenas for the attendance of witnesses or the production of documents;

(e) inform the party that the hearing will initially be held by telephone conference;

(f) if the hearing is by telephone conference, inform the party that before the hearing record is closed, the party will have an opportunity, at the party's request or upon a showing that a party's case was prejudiced by the lack of an in-person hearing, to request a de novo in-person hearing;

(g) give the party directions for the conduct of telephone hearings;

(h) direct the party to provide a telephone number at which the party will be available for the hearing and further direct that if the party does not provide the number or fails to be at the number when called for the hearing, the ALJ may either enter the party's default or proceed with the hearing in absentia; and

(i) inform the party that if the party does not have a telephone available for a telephone hearing, at the party's request, a telephone will be made available to the party at the nearest regional CSED office or at the public assistance office in the county where the party resides.

37.62.949 PROPOSED DECISION, FINAL DECISION AND ORDER

(1) Following the close of hearing and the receipt of post-hearing briefs and other evidence ordered by the ALJ, the presiding ALJ shall prepare a proposed decision and order. Copies of the proposed decision and order shall be served on each party as provided in ARM 37.62.917. A proposed decision and order is interim in effect and does

not become a final CSED decision and order except as provided in (2) of this rule and by ARM 37.62.951(6) .

(2) The parties shall have 20 days following service of the proposed decision and order to review the order. At the end of the 20 days, the presiding ALJ may enact the proposed decision and order as a final CSED order unless a party, within the 20 day review period, files a motion to review the proposed order as provided by ARM 37.62.951. A decision and order that becomes final under this rule takes effect as to its terms on the date it is enacted. Copies of the final decision and order shall be delivered or mailed to each party, and to each party's attorney if any.

(3) Proposed and final decisions and orders must include findings of fact, conclusions of law and the policy reasons for the decision if the decision is based on an exercise of CSED discretion as referenced in ARM 37.62.905(1) (b) .

(a) Findings of fact must be accompanied by a concise and explicit statement of each of the underlying facts in the record or officially noticed that support those findings.

(b) Each conclusion of law must be supported by cited authority or by a reasoned explanation.

(c) If a party attempted to or did rebut the applicability of any policy, fact or other material officially noticed under ARM 37.62.929, the order must include appropriate findings and conclusions.

(d) If the admissibility of an exhibit or other evidence was not ruled on during the hearing as provided by ARM 37.62.927, the order must contain a ruling on the evidence and state the reasons why the evidence was accepted or rejected.

(e) If a party submitted a motion under ARM 37.62.951, the final order must include a ruling, separately stated, on each issue raised, each finding of fact or ruling of law requested, each policy consideration raised or contested, and any other matter permitted by ARM 37.62.951 as a ground for revising a proposed order

37.62.951 MOTION TO REVIEW PROPOSED ORDER (1) Within 20 days after service of a proposed decision and order any party may file a motion to review the order.

(2) A motion to review must set out, with specificity, one or more of the following grounds upon which a proposed order may be reviewed:

(a) Through inadvertence or mistake, the ALJ overlooked an important fact presented at the hearing which could affect the decision;

(b) The ALJ considered some fact that is not in the hearing record;

(c) A party requested a specific finding of fact or conclusion of law which was not made;

(d) The ALJ failed to consider a law, a policy or other material under ARM 37.62.905 which the ALJ should have included as a matter of course;

(e) The ALJ inappropriately applied official notice to a fact or other material under ARM 37.62.929;

(f) When the admissibility of evidence was ruled upon after a matter was submitted for decision, the ALJ improperly accepted or rejected the evidence;

(g) New evidence was discovered or became accessible after the hearing was closed and that evidence was not reasonably available at the time of the hearing;

(h) The ALJ based the order on a mistake of fact or law; or

(i) There have been intervening changes in controlling law.

(3) A motion to review is not for the purpose of:

(a) allowing the parties to present the case under new theories;

(b) presenting arguments which the ALJ has already considered and rejected;

(c) raising arguments which could or should have been made before the initial decision was rendered; or

(d) rehearing the case on the merits.

(4) The motion must be considered by the same presiding ALJ who issued the proposed decision and order.

(5) The presiding ALJ may, upon the ALJ's own initiative and without need for a motion, initiate a review under this rule. The provisions of (6) then apply as if a timely motion to review had been made by a party.

(6) Upon receipt of a timely filed motion to review which specifies one or more of the grounds set out in (2) , the presiding ALJ shall afford each party an opportunity to respond to the motion and, upon request, to present oral argument and submit written briefs on the matters raised by the motion. After considering the motion and the responses to the motion, the ALJ may affirm the proposed decision or correct, amend or modify it as necessary. If affirmed, the proposed order shall be enacted as a final CSED order. The enacted order takes effect as to its terms on the date it is enacted. If corrected, amended or modified, the ALJ shall issue a revised decision and order that is consistent with the proposed order as corrected, amended or modified. The revised decision and order shall be effective as a final CSED decision and order on the day it is signed by the ALJ. Copies of decisions and orders that become final under this rule shall be delivered or mailed to each party, and to each party's attorney if any.