



Children, Families, Health, and Human Services Interim Committee

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62nd Montana Legislature

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June 13, 2011

TO: Committee Members
FROM: Julianne Burkhardt, Staff Attorney
RE: Overview of Rulemaking and Administrative Rule Activity

Rulemaking and Powers of Rule Review Committees and Individual Members

1. General concepts:

- a. What is a rule? Montana Administrative Procedure Act (MAPA) defines it as an agency regulation, standard, or statement that implements, interprets, or prescribes law or policy. Most agency rules have the force and effect of law.
- b. Where are Montana's rules located? Administrative Rules of Montana (ARMs) are the administrative rules in their entirety. They are updated by MAR (the Montana Administrative Register), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes. The ARMs are also published to the Internet at <http://www.mtrules.org/>.
- c. Why are rules adopted?
 - (1) To "fill in gaps" left by legislation and provide the public with certainty as to what is required.
 - (2) To allow the public input into what the rules will be.

2. Citations to statutes concerning rulemaking:

- a. Montana Administrative Procedure Act (MAPA), Title 2, chapter 4, MCA.
- b. Section 5-5-215, MCA -- interim committee powers generally.
- c. Section 5-5-225, MCA -- specific rulemaking review authority of Children, Families, Health, and Human Services Interim Committee.

- d. Section 5-11-107, MCA -- interim committee investigatory powers generally.
- e. Section 2-4-102, MCA -- "rule" is adoption of an entire rule, an amendment to a rule, or repeal of a rule.

3. Rulemaking generally:

- a. Rule adoption system -- governs procedure only; generally, MAPA is not authority to adopt rules (2-4-301, MCA).
- b. MAPA is procedure most used by agencies to adopt rules. Some agencies are exempted completely from MAPA; a few agencies have a different statutory system for rule adoption.
- c. Authority to adopt most rules must be express and not implied authority (2-4-305, MCA).
- d. Two notices must be published in Montana Administrative Register (MAR): proposal notice and adoption notice. The notice format is specified by Secretary of State's rules (2-4-306, MCA).
- e. Hearing on rule proposal required in some instances, but an agency can voluntarily hold a hearing (2-4-302, MCA):
 - (1) matter of significant interest to public.
 - (2) request by a rule review committee.
 - (3) request by minimum of 25 or 10% of those affected by proposed rule.
 - (4) request by association.
 - (5) request by agency or political subdivision.
- f. Time periods (2-4-302, MCA):
 - (1) minimum 30 days' notice before agency action.
 - (2) minimum 20 days' notice of public hearing (if held).
 - (3) minimum 28 days to submit comments.
 - (4) total minimum time for rule adoption is 30 days' notice, plus approximately 2 weeks to publish adoption notice. This includes:
 - (a) time period for hearing and written comments; or
 - (b) time for written comment alone if no hearing.
 - (5) Six-month maximum for adoption and publication (2-4-302 and 2-4-305, MCA).
 - (6) emergency rules exception (2-4-303, MCA).
- g. Minimum requirements for content of notice of proposed rulemaking (2-4-305, MCA):
 - (1) agency must have and cite in the proposal notice express statutory authority for rules (usually not in MAPA, per above).
 - (2) agency must have and cite statute being implemented by proposed rule

- which sometimes is the same as authority, though frequently different.
- (3) agency must state rationale, or statement of "reasonable necessity", for proposed rule.
 - (4) foregoing three requirements are where most agency errors occur in the rulemaking process.

h. Committee work starts with committee staff review, on committee's behalf, for those three items in paragraph 2 above. Committee review is mandatory in accordance with 2-4-402(1), MCA.

- (1) Problems with a proposed rule will be brought to committee for resolution only if staff can't resolve the issue with the agency.
- (2) All proposals and adoptions will be brought to committee's attention at every meeting and sometimes by e-mail between meetings if the situation warrants.

i. After rule is adopted through publication in the MAR, the rule is published in the Administrative Rules of Montana.

4. Committee powers:

a. Mostly in MAPA - some in other statutes (5-5-215 and 5-11-107, MCA, mentioned earlier).

b. Committee powers:

- (1) request and obtain agency rulemaking record for review (2-4-402, MCA).
- (2) recommend to the appropriate agency adoption, amendment, rejection, or repeal of any rule (2-4-402, 2-4-411, and 2-4-412, MCA).
- (3) request rulemaking hearing be held (2-4-402, MCA).
- (4) bring or participate in litigation involving MAPA (2-4-402, MCA).
- (5) review "incidence and conduct" of proceedings under MAPA (2-4-402, MCA).
- (6) object, as individual committee members, to proposed rules and notify the committee presiding officer of the objection, in order to delay adoption of the rule by an agency (2-4-305(9), MCA).
- (7) submit oral or written comments to agency rulemaking record (2-4-402, MCA).
- (8) conduct poll of Legislature to see if rules follow legislative intent.
 - (a) discretionary poll or mandatory poll (2-4-403, MCA).
 - (b) effect of poll (2-4-404, MCA).
 - (c) publication of results of poll (2-4-306, MCA).
- (9) request or have prepared an economic impact statement regarding a proposed rule (2-4-405, MCA).
- (10) object to a proposed rule for purposes of shifting the burden of showing legality of adoption (2-4-306 and 2-4-406, MCA.)
- (11) hold hearings and conduct investigations involving agency compliance with MAPA and other statutes (5-11-107, MCA).

- (12) recommend amendments to MAPA or other state laws (2-4-411, MCA).
- (13) request publication of material adopted by reference in a rule (2-4-307, MCA).
- (14) request publication of statement on adjective or interpretive rules (2-4-308, MCA).
- (15) request and receive copies of documents in litigation involving judicial construction of rule or MAPA (2-4-410, MCA).
- (16) monitor operations of agency within committee's jurisdiction (5-5-215, MCA).

5. Powers of individual members of committee or Legislature:

- a. As member of Legislature, petition for adoption, amendment, or repeal of a rule (2-4-315, MCA).

- b. As prime sponsor, receive notice from agency, before it writes rules, of its intent to write the rule. The manner and date of notice to the prime sponsor must be stated in the notice of proposed rulemaking (2-4-302, MCA).

- c. Request agency form informal conference or committee to develop proposed rule before agency publishes notice (2-4-304, MCA).

- d. Join agency's list of interested persons for purposes of rulemaking (2-4-302, MCA).

- e. Contribute to agency rulemaking record by (2-4-302 and 2-4-305, MCA):
 - (1) writing or e-mailing agency, as provided in the agency's proposal notice, before the rulemaking record closes.
 - (2) testifying at any agency rulemaking hearing.

- f. Object to committee presiding officer regarding proposed rule in order to delay adoption of rule so committee can review proposed rule (2-4-305(9), MCA).

- g. Request, by motion, that interim committee take any of those actions authorized by law for committee to take (see 4b above).

Department of Public Health and Human Services Rule Review

Emergency Rules MAR 37-549, June 1, 2010, NOTICE OF ADOPTION OF TEMPORARY EMERGENCY RULES AND REPEAL. The DPHHS has filed a NOTICE of adoption of 7 emergency rules implementing the requirements of SB 423 regarding medical marijuana. The emergency rules were effective on June 1, 2011. Pursuant to 2-4-303, MCA these rules are only valid for 120 days and are only allowed in situations of imminent peril to public health safety or welfare. During the 120 days DPHHS will

promulgate permanent rules through the normal procedure. Section 33 of SB 423 also requires DPHHS to promulgate emergency rules in order to allow for issuance of registry cards beginning on June 1, 2011. DPHHS issued 7 emergency rules dealing with necessary definitions, application process, physician statements, application requirements for minors, provider requirements, fees, and registry card replacement. In addition, DPHHS repealed the administrative rules promulgated under the previous medical marijuana law which was repealed and replaced by SB 423.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-536 NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION. DPHHS has filed a NOTICE in the matter of proposed rules regarding the Montana Medicaid Provider Incentive Program for electronic healthcare records. These rules are designed to implement the Medicaid Provider Incentive Program to provide incentive payments to medical providers who adopt, implement or upgrade electronic health record technology. MAR 37-536 proposes 13 rules on the following topics: purpose, definitions, eligible provider registration, eligible provider verification, reporting requirements, proof of electronic health record certification, communication with providers, application for payments by providers, eligible provider incentive payment schedule, and denials and appeals.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-537, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.40.307 regarding nursing facility reimbursements; 37.40.325 regarding change in provider defined; 37.40.330 regarding separately billable items; and 37.40.361 regarding direct care and ancillary services workers' wage reporting/additional payments. The rule revisions relate to updates to provider rate reimbursement for Medicaid nursing facility services.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-538, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.87.1303 regarding home and community based services for youth with serious emotional disturbance; ARM 37.87.1305 regarding eligibility of youth; ARM 37.87.1307 regarding loss of service and disenrollment of youth; ARM 37.87.1321 regarding provision of services; and ARM 37.87.1333 regarding reimbursement. The NOTICE further proposes repeal of the following rules: ARM 37.87.1323 regarding plan management; ARM 37.87.1338 regarding consultative clinical and therapeutic requirements; ARM 37.87.1339 regarding customized goods and services; ARM 37.87.1340 regarding education and support services; ARM 37.87.41 regarding home based therapy requirements; ARM 37.87.1342 regarding non-medical transportation; ARM 37.87.1343 regarding respite care; ARM 37.87.1344 regarding family support specialists; ARM 37.87.1345 regarding caregiver peer to peer support; and ARM 37.87.1346 regarding wraparound services. The amendments deal with updates to current CMS guidelines and requirements. The rules proposed for repeal are being organized in a provider policy manual which DPHHS believes will be more user friendly.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-539, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.86.805 hearing aid services reimbursement; ARM 37.86.1004 regarding reimbursement methodology for dentists; ARM 37.86.1105 regarding outpatient drug reimbursement; ARM 37.86.1506 regarding infusion reimbursement; ARM 37.86.2207 regarding early and periodic screening reimbursement; ARM 37.86.2405 transportation and per diem reimbursement; and 37.86.2605 ambulance services reimbursement. The changes reflect changes to provider rates which took effect in FY 2010 and will remain constant in FY 2011.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-540, NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT. DPHHS has filed a NOTICE in the matter of the proposed adoption of a new rule regarding reimbursement for self directed personal assistance services. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.40.705 regarding home health services reimbursement; ARM 37.40.1105 regarding personal care services reimbursement; and ARM 37.40.1302 regarding self directed personal care services. The changes reflect changes to provider rates which took effect in FY 2010 and will remain constant in FY 2011.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-541, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.85.212 regarding resource based relative value scale (RBRVS) reimbursement for specific provider types; and ARM 37.86.105 physician services reimbursement. The RBRVS system is used by medicare and medicaid for reimbursement and is revised annually by the Centers for Medicare and Medicaid services (CMS) and the AMA. The amendment to ARM 37.85.212 proposes to adopt current relative value units (RVUs) involved in each medical procedure. ARM 37.86.105 relates to implementing current drug pricing codes.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-542, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.79.102 amending the definition of the federal poverty level to reflect current levels.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-543, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.86.2224 regarding early and periodic screening; ARM 37.87.808 targeted case management services for youth with serious emotional disturbance; ARM medicaid mental health services for youth reimbursement; and ARM 37.87.903 medicaid mental health services for youth authorization. The proposed amendments will be reducing the reimbursement rates to identified medicaid providers by up to 2% beginning in August of 2011. The changes reflect increases to provider rates which took effect in FY 2010 and will remain constant in FY 2011.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-544, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.86.3607 regarding case management services for persons with disabilities reimbursement.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-545, NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT. DPHHS has filed a NOTICE in the matter of A proposed new rule regarding graduate medical education payment program. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.86.2801 regarding hospital reimbursement; ARM 37.86.2901 adding the definition of graduate medical education; and ARM 37.86.2907 regarding inpatient reimbursement rates. The changes reflect increases to provider rates which took effect in FY 2010 and will remain constant in FY 2011. The new rule proposes a general medical education program for the purpose of providing formal hospital based training and education subject to available funding and approval of the state plan by CMS.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-546, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.86.3515 regarding case management services for adults with severe mental illness reimbursement; ARM 37.88.907 adult mental health services reimbursement; ARM 37.89.125 regarding mental health services plan provider reimbursement; ARM 37.89.523 regarding eligibility for crisis stabilization reimbursement; and ARM 37.90.408 home and community services for adults with severe mental illness reimbursement. The changes reflect increases to provider rates which took effect in FY 2010 and will remain constant in FY 2011.

MAR 2011 Issue No. 10 (May 26, 2011) MAR Notice No. 37-547, NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT. DPHHS has filed a NOTICE in the matter of proposed adoption of a new rule regarding effective dates for Montana Medicaid provider fee schedules. DPHHS has filed a NOTICE in the matter of proposed amendments to ARM 37.40.1421 regarding home and community based services for elderly reimbursement. The changes reflect increases to provider rates which took effect in FY 2010 and will remain constant in FY 2011.

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