



Children, Families, Health, and Human Services Interim Committee

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65th Montana Legislature

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November 8, 2017

Director Sheila Hogan
Department of Public Health and Human Services
111 North Sanders, Suite 301
Helena, MT 59620

Dear Director Hogan:

Pursuant to the Children, Families, Health, and Human Services Interim Committee's (Committee) authority as the appropriate administrative rule review committee under 5-5-225, MCA, and the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, parts 3 and 4, this letter constitutes notice to the Department of Public Health and Human Services (Department) that a majority of the members of the Committee objects under 2-4-406, MCA, to the following notices of proposed rulemaking:

- 37-788, pertaining to updating the effective dates of non-Medicaid and Medicaid fee schedules to October 1, 2017;
- 37-801, pertaining to behavioral health targeted case management fee schedule;
- 37-802, pertaining to amendments to fee schedules; and
- 37-805, pertaining to revising nursing facility reimbursement rates for state fiscal year 2018.

Under 2-4-406, MCA, an administrative rule review committee may object to proposed rulemaking if the committee considers the proposed rulemaking to not have been proposed in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, MCA. The Committee objects to MAR notice numbers 37-788, 37-801, 37-802, and 37-805 for the following reasons:

(1) *Reasonable necessity for the proposed rulemaking has not been sufficiently demonstrated as required pursuant to 2-4-302(1) and 2-4-305(1) and (6), MCA.* The statement of reasonable necessity must address the reasonableness component by stating the principal reasons and rationale for the intended action and for the particular approach taken. §2-4-305(6), MCA. The Department has proposed a 3.47% provider rate reduction, stating that the reduction is necessary to implement the mandated legislative reductions contained in Senate Bill 261 (2017) and to stay within appropriations contained in House Bill 2 (2017). The Department has failed to adequately

state the reasonableness component by not specifically detailing how the Department arrived at the 3.47% reduction. Further, while the appropriation reduction in section 21 of Senate Bill 261 must be used to reduce Medicaid provider rates, the .5% general fund reduction contained in section 12 of the bill is not specific to provider rates. The Department has failed to demonstrate the principal reasons for and rationale behind and the necessity for further reducing provider rates as opposed to making reductions elsewhere.

(2) *The proposed rulemaking is not within the standards prescribed by 53-6-101, MCA, and Senate Bill 261 as required under 2-4-305(5), MCA.* A proposed rule is invalid unless it is "within the scope of authority conferred and in accordance with standards prescribed by other provisions of law". §2-4-305(5), MCA. Although under 53-6-113, MCA, "[the] department may in its discretion set rates of reimbursement that it determines necessary for the purposes of the [Medicaid] program," the Department is required to consider the following principles when considering changes that will either increase or decrease Medicaid services:

"(a) protecting those persons who are most vulnerable and most in need, as defined by a combination of economic, social, and medical circumstances;

(b) giving preference to the elimination or restoration of an entire medicaid program or service, rather than sacrifice or augment the quality of care for several programs or services through dilution of funding; and

(c) giving priority to services that employ the science of prevention to reduce disability and illness, services that treat life-threatening conditions, and services that support independent or assisted living, including pain management, to reduce the need for acute inpatient or residential care." §53-6-101(2), MCA.

The Committee received both written comments and hours of public comment that the proposed rate reductions will disproportionately negatively impact the most vulnerable persons who are most in need and will result in a reduction of services that keep individuals in the community, increasing the need for acute inpatient or residential care and, as a result, actually increasing costs to the Medicaid program. This is directly contrary to the principles enumerated above. In addition, the 3.47% reduction is broader than the approximately 1% reduction that was envisioned under section 21 of Senate Bill 261.¹

If a rule is objected to under 2-4-406, MCA, before the rule is adopted, as is the case here, the rule is not effective until the day after final adjournment of the regular session of the Legislature that begins after the notice proposing the rule was published by the Secretary of State unless:

(1) the administrative rule review committee withdraws its objection under 2-4-406, MCA, before the rule is adopted; or

(2) the rule is adopted with changes that in the opinion of a majority of the committee members, as communicated in writing to the committee presiding officer and staff, make the rule comply with the committee's objection and concerns. §2-4-306, MCA.

¹Exhibit No. 4, Free Conference Committee on SB 261, April 26, 2017.

Please note that the Department is required to respond in writing to the Committee's objection within 14 days of the mailing of this objection. §2-4-406, MCA.

Thank you for your consideration of this matter.

Sincerely,

Mary Caferro

Presiding Officer, Children, Families, Health, and Human Services Interim Committee

cc: Brenda K. Elias, Rule Reviewer, DPHHS Office of Legal Affairs
Caroline Warne, Rule Reviewer, DPHHS Office of Legal Affairs
Sue O'Connell, Research Analyst
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