



Children, Families, Health, and Human Services Interim Committee

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60th Montana Legislature

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TO: Committee members
FROM: Lisa Mecklenberg Jackson, Staff Attorney
RE: DPHHS Administrative Rule Activity
DATE: August 13, 2008

The Department of Public Health and Human Services has filed the following rule notices with the Secretary of State's Office for publication in the Montana Administrative Register (MAR):
*(Notices in their entirety are available online at:
<http://www.dphhs.mt.gov/legalresources/recentlyadoptedrules/index.shtml>)*

Notices of Adopted Rules:

I.

MAR 2008 Issue No. 11 (June 12, 2008), MAR Notice No. 37-434, NOTICE OF ADOPTION, AMENDMENT, AND REPEAL -- a public hearing was held April 16, 2008 to consider the adoption of one new rule, the amendment of eight rules, and the repeal of one rule pertaining to Temporary Assistance for Needy Families (TANF). No comments or testimony were received. The department added a post-employment program that would benefit households which would otherwise lose eligibility for TANF cash assistance due to new or increased earned income of an individual currently receiving TANF cash assistance. Households are eligible to receive an assistance payment in a set amount for a period up to, but not exceeding, three months. Individuals in this program are required to negotiate a Family Investment Agreement/Employability Plan (FIA/EP) that would include their employment hours as allowable work activities. They would be considered TANF recipients and therefore eligible for TANF child care services for employment hours negotiated in the FIA/EP. They would also be eligible to receive TANF supportive services to assist with continued participation and employment.

II.

MAR 2008 Issue No. 11 (June 12, 2008), MAR Notice No. 37-435, NOTICE OF AMENDMENT -- a public hearing was held May 5, 2008 to consider the amendment of one rule pertaining to resource based relative value scale (RBRVS). No comments or testimony were received. The amendment updates the resource based relative value scale (RBRVS) fees paid to enrolled Medicaid providers in accordance with the most recently published relative value units (RVUs) released by CMS. The change in the Montana Medicaid fees was effective July 1, 2008. Also, HB 2 in 2007 appropriated an additional 1.67% provider rate increase and a physician specific appropriation of \$2,043,234 for physicians. ARM 37.85.212 specifies the reimbursement methodology for these multiple professional providers.

III.

MAR 2008 Issue No. 11 (June 12, 2008), MAR Notice No. 37-436, NOTICE OF REPEAL -- the department has repealed one rule pertaining to the direct care wage add-on for certain mental health care providers. No comments or testimony were received. The department repealed ARM 37.88.1111. The rule is obsolete and the direct care wage add-on for certain mental health care providers will be accomplished via contracts with the providers instead. There is no negative impact to providers.

IV.

MAR 2008 Issue No. 12 (June 26, 2008), MAR Notice 37-438, NOTICE OF AMENDMENT -- a public hearing was held May 14, 2008 to consider the adoption of one new rule and the amendment of four rules pertaining to Medicaid nursing facility reimbursement. Five written comments were received. The department has decided not to adopt the proposed new rule and not to amend three of the four rules (the amended rule contains housekeeping changes) mentioned in the original rule proposal because of a recent federal moratorium. In May 2007, CMS adopted changes related to cost limits for providers operated by "units of government" and altering the definition of public status that would apply to nursing facility services. These changes were under a congressional moratorium for one year which expired in May 2008. However, the House and Senate recently proposed an extended moratorium on the provider cost limit for units of government and the U.S. Department of Health and Human Services is voluntarily delaying implementation until August 1, 2008. Accordingly, the department has decided to delay implementation of the unit of government provisions as outlined in the proposed rule notice. The department will set payment rates for 2009 in accordance with the current rate methodology without the cost limits initially proposed.

V.

MAR 2008 Issue No. 11 (June 12, 2008), MAR Notice 37-439, NOTICE OF AMENDMENT -- a public hearing was held May 14, 2008 to consider the amendment of three rules pertaining to Medicaid requirements and reimbursements for outpatient drugs. The department amended ARMs 37.86.1101 and 37.86.1102 allowing Medicaid providers to dispense maintenance medications sufficient for a 90-day supply or 100 units, whichever is greater. This would be an increase from the current rule limiting all medications to a 34-day maximum supply. Five written comments were received, several noting concern that a 90-day supply would harm patients by limiting interactions with the pharmacy. The department disagreed saying this service is intended only for select classes of medication and only after the patient is established on a stable dose. A patient filling a prescription for a new medication or new strength of medication would not be allowed to fill a maintenance supply of a medication until it has been demonstrated that the patient can tolerate and appropriately respond to the medication. The department also added a requirement that providers maintain a signature log for all prescriptions. Finally, an amendment to ARM 37.86.1105 implements a 1.67% increase in the Medicaid pharmacy dispensing fee as allowed by legislative appropriation. This would increase the maximum dispensing fee from \$4.86 to \$4.94 for in-state providers.

VI.

MAR 2008 Issue No. 11 (June 12, 2008), MAR Notice 37-440, NOTICE OF AMENDMENT -- a public hearing was held May 15, 2008 to consider the amendment of six rules pertaining to hearing aid services, dental, home infusion therapy, durable medical equipment, and ambulance services. No comments or testimony were received. The amendments are necessary to implement Medicaid reimbursement rate increases mandated in appropriations made by the 2007 Montana Legislature. The proposed rates would be 1.67% more than currently paid for hearing aid, dentist, home infusion therapy, transportation, and ambulance services.

VII.

MAR 2008 Issue No. 12 (June 26, 2008), MAR Notice 37-442, NOTICE OF ADOPTION AND AMENDMENT -- a public hearing was held June 2, 2008 to consider adoption of four new rules and the amendment of one rule pertaining to Medicaid eligibility. The department adopted four new rules to clarify the existing policy of the Public Assistance Bureau that in determining Medicaid eligibility, exclusions may not be applied to any property a filing or assistance unit does not own, and to foreclose any beliefs that filing or assistance units may apply exclusions to property they do not own if the property is owned by or held pursuant to some legal entities, instruments, or devices, and not others. In determining Medicaid eligibility, the value of property necessary for employment is excluded from the calculation. The value of property not personally owned, but owned by another legal entity, such as a trust, corporation, or LLC is not excluded. The rationale for the employment exclusion is to ensure that the applicants who own property necessary for employment such as plumbers who own plumbing tools, are not put in the position of having to sell that property in order to fall within the resource limit. When an applicant or spouse does not personally own the property, he or she has no legal right to sell it in the first place, and so the harm sought to be mitigated by the exclusion is not present. The department further stated that the standard requiring personal ownership of property before allowing a resource exclusion for that property is a blunt, but necessary, standard for the department to determine who is truly the poorest of the poor and hence entitled to extremely limited Medicaid funds.

VIII.

MAR 2008 Issue No. 13 (July 17, 2008), MAR Notice 37-443, NOTICE OF AMENDMENT -- a public hearing was held June 19, 2008 to consider amendment of one rule pertaining to laboratory testing fees. No comments or testimony were received. The department modified ARM 37.12.401 to reference the new version of the state laboratory fee list, which provides an average increase of 4% in the cost of lab services. The revised fees are necessary to keep the fees charged for lab service in line with the actual current cost associated with providing that service.

IX.

MAR 2008 Issue No. 14 (July 31, 2008), MAR Notice 37-444, NOTICE OF AMENDMENT -- a public hearing was held July 2, 2008 to consider amendment of two rules pertaining to the low income weatherization assistance program (LIWAP). No comments or testimony were received. LIWAP is a federal program that provides for energy conservation measures to the dwellings of eligible low income families. Funding comes from three different sources: the U.S. Department of Energy's Weatherization Program, Northwestern Energy's Free Weatherization Program, and

the U.S. Department of Health and Human Services Low Income Energy Assistance Program (LIEAP). Montana currently sets aside 15% of its LIEAP allotment for weatherization services. These amendments allow previously weatherized dwellings to be reweatherized after 10 years and provide that LIEAP funds may be used at any time to address a weatherization related imminent threat to the health and safety of an otherwise eligible household or to replace or make cost effective modifications to an otherwise eligible household's heating system to utilize a less expensive energy source, and may be used at any time to weatherize a dwelling that has been damaged by fire, flood, or Act of God if the damage to weatherization materials will not be paid for by insurance. Contains perhaps the only definition to "Act of God" that I am aware of. An event caused solely by forces of nature without human involvement.

Notices of Proposed Rules:

X.

MAR 2008 Issue No. 12 (June 26, 2008), MAR Notice 37-445, NOTICE OF PROPOSED ADOPTION, AMENDMENT, AND REPEAL -- the department has filed a NOTICE in the matter of the proposed adoption of one new rule, the amendment of 16 rules, and the repeal of one rule pertaining to Medicaid inpatient hospital reimbursement. A hearing was held July 16, 2008 in the AMDD Conference Room, 555 Fuller Avenue, Helena, Montana. The comment period ran until July 24, 2008. The department is proposing these rules to amend the Medicaid reimbursement methodologies for inpatient hospital services. The proposed new reimbursement methodology for most hospitals would be based on All Patient Refined Diagnosis Related Groups (APR-DRGs). Only exempt hospitals, critical access hospitals, and preferred out-of-state hospitals would be reimbursed based on a hospital specific Medicaid inpatient cost to charge ratio. In addition, the department proposes to phase out the "Preferred Out-of-State" hospital services reimbursement category and create a "Centers of Excellence" category. Centers of Excellence Hospitals will be a new designation for hospitals that provide services at a higher level of comprehensive care and are essential to Montana Medicaid to provide access to care otherwise not available (ex. heart transplants). Based on recommendations from a workgroup, the department is moving away from CMS bundling rules and intends to simplify the rule by requiring that any service on the day before or the day of the inpatient stay be bundled. The department anticipates that Medicaid payments to in-state hospitals overall will increase by 10%, overall payments to border hospitals will increase by 12%, and overall payment to out-of-state hospitals will decrease by 19%. The department intends the rule changes to be effective October 1, 2008.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and no technical problems were noted.

XI.

MAR 2008 Issue No. 13 (July 17, 2008), MAR Notice 37-446, NOTICE OF PROPOSED AMENDMENT -- the department has filed a NOTICE in the matter of the proposed amendment of three rules pertaining to Medicaid acute services reimbursement. No public hearing is contemplated. The comment period runs until August 14, 2008. The proposed rule changes are necessary to bring Medicaid reimbursement rates for therapies, audiology services, and school

based health related services into conformity with the reimbursement methodology proposed for the resource based relative value scale (RBRVS) adopted via MAR Notice 37-435 (see II. above). Leaving the existing rules unchanged would adversely result in lower than intended reimbursement amounts for these provider types.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and no technical problems were noted.

XII.

MAR 2008 Issue No. 13 (July 17, 2008), MAR Notice 37-447, NOTICE OF PROPOSED ADOPTION, AMENDMENT, AND REPEAL -- the department has filed a NOTICE in the matter of the proposed adoption of 11 new rules, the amendment of 10 rules, and the repeal of two rules pertaining to the mental health services plan. A hearing was held August 6, 2008 in the Wilderness Room, 2401 Colonial Drive, Helena, Montana. The comment period runs until August 14, 2008. The proposed changes include increased Medicaid reimbursement rates for providers of mental health services to Mental Health Services Plan (MHSP) enrollees, revised enrollment standards for adults, and technical changes to the rules for enrollees and providers of MHSP services to persons 17 and younger. The department is taking this opportunity to reorganize the MHSP rules so the provisions governing youths will appear in a separate chapter of the ARMs rather than throughout the department's rules (moving from Title 37, chapter 89). The changes are necessary to enable the department to transition the MHSP to a fee-for-service program as mandated by the 2007 Legislature. Rule I contains definitions including the Children's System of Care Account (new in 2007) to fund the administration and delivery of services to high risk children. Proposed new Rule II would contain the criteria for designating a youth "seriously emotionally disturbed." This is not new criteria, just a rearrangement. Proposed new Rules III through XI reflect the reorganization of the MHSP rules for youth with SED into its own subchapter. Proposed new Rule III specifies MHSP eligibility criteria. It limits youth eligibility for covered services under the MHSP to youths 17 years of age or younger with a serious emotional disturbance. A youth may not be eligible for MHSP if the youth is eligible for Medicaid or CHIP. New Rule VI states that licensed providers employed by a mental health center may enroll as a Medicaid provider and provide service to youth with SED who are covered under the MHSP plan. New Rule VIII provides that MHSP services to youth with SED are not subject to premium payments and copayments. Rule IX contains notice, grievance, reconsideration, and rights in the event of an adverse action by the department. Rule XI implements the system of care account which is designed to reimburse in-state or community based services providers for high risk youth with multiagency services needs. Services should be provided in the least restrictive and most appropriate setting. The fiscal effect of that change is limited to \$500,000.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and staff noted that although the proposed rule concerned legislation passed in 2007, the rule proposal notice stated that the sponsor requirement of 2-4-302, MCA, did not apply. Upon contacting the rule reviewer, staff was told that the 2007 bill sponsor had been notified; the language in the rule proposal was simply incorrect. The language can be corrected in the rule adoption notice. No other technical

problems were noted.

XIII.

MAR 2008 Issue No. 14 (July 31, 2008), MAR Notice 37-448, NOTICE OF PROPOSED ADOPTION, AMENDMENT, AND REPEAL -- the department has filed a NOTICE in the matter of the proposed adoption of 13 new rules, the amendment of three rules, and the repeal of 15 rules pertaining to Medicaid and MHSP reimbursement for youth mental health services. A hearing will be held August 22, 2008 in the Wilderness Room, 2401 Colonial Drive, Helena, Montana. The comment period runs until August 28, 2008. The department is proposing a 1.67% rate increase for youth mental health services reimbursement under the Medicaid Mental Health Fee Schedule for SFY 2009, as well as proposing to combine half-day treatment with day treatment for reimbursement purposes, while adding moderate and permanent therapeutic foster care. The inpatient psychiatric care administrative rules would be changed to psychiatric residential treatment facility (PRTF) rules to align them with federal regulations. The department does not see a practical alternative to bundling all Medicaid services provided to youth in a PRTF and expects the department will reimburse PRTFs a percentage of the medical and ancillary expenses they incur. Proposed new Rules I through XIII are part of a reorganization of the mental health rules for youth with serious emotional disturbance (SED). Currently, those rules are located throughout the rules of the department. The department is proposing the rule reorganization because it has proved difficult for consumers and providers to locate rules for youth with SED. "Residential treatment facility" is being changed to "Psychiatric residential treatment facility." Language has been changed to take out the case management signature requirement on the certificate of need (CON) for residential treatment facility services. New federal regulations for case management prohibit one Medicaid service being a requirement to receive other Medicaid services. Accordingly, targeted case management cannot be used as a "gate keeper" for other services. Rule VII adds specific language regarding active treatment, an individualized plan of care, specific discharge plan requirements, and review time frames, as well as language from the federal regulations specifying what is required in the plan of care to reflect the bundled service requirement. Rule IX adds chemical dependency services to PRTF services on the premise that many youth receiving PRTF services also have a co-occurring substance abuse or dependency diagnosis that should be treated concurrently with their psychiatric diagnosis. Language was also added requiring that providers notify the department when recipients are discharged. Out-of-state PRTFs would be reimbursed 50% of their usual and customary charges. The department is proposing repeal of ARM 37.88.1101 through 37.88.1137 as they would be replaced by proposed new Rules I through XIII, effective October 1, 2008. The amended rules, if adopted, will be applied retroactively to July 1, 2008.

TECHNICAL NOTE: FYI--DPHHS rule review staff stated that most of the language in these new rules is taken verbatim from the old rules (proposed to be repealed). The proposed rules were reviewed by committee staff and no technical problems were noted.

XIV.

MAR 2008 Issue No. 15 (August 14, 2008), MAR Notice 37-449, NOTICE OF PROPOSED AMENDMENT -- the department has filed a NOTICE in the matter of the proposed amendment

of one rule pertaining to preferred hospital transportation reimbursement. No public hearing is contemplated. The comment period runs until August 14, 2008. The proposed rule change is necessary to bring Medicaid transportation and per diem provisions into conformity with the proposed designation of certain out-of-state health care providers as "Centers of Excellence" (see X. above). The rule amendment is proposed to be effective October 1, 2008.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and it was noted this rule proposal initially was numbered 37-445, although another notice with that number already existed. The department reissued this proposal notice (hospital transportation reimbursement) as MAR Notice 37-449. There was also an error in the text of the proposed rule. Reference was made to MAR Notice 37-435; this should have been a reference to MAR Notice 37-445, as noted above. DPHHS staff have been notified of the error and will make the correction.

XV.

MAR 2008 Issue No. 15 (August 14, 2008), MAR Notice 37-450, NOTICE OF PROPOSED ADOPTION AND AMENDMENT -- the department has filed a NOTICE in the matter of the proposed adoption of one new rule and the amendment of three rules pertaining to living wills. A hearing will be held September 3, 2008 in the Sapphire Room, 2401 Colonial Drive, Helena, Montana. The comment period runs until September 11, 2008. The department proposes to adopt and amend these rules in order to adopt "Provider Orders for Life-Sustaining Treatment" (POLST), a program designed to improve the quality of care people receive at the end of life by improving communication of patient wishes, and documenting of medical orders on a single form. New Rule I reflects that the Board of Medical Examiners and the department have adopted, and the department has approved POLST as the protocol for implementing do-not-resuscitate (DNR) orders in medical settings. The department notes that sometimes DNR and advance directives are unavailable to ambulances or hospitals. POLST forms accompany patients as they are transferred to and from different locations and facilities and would alleviate this problem. The current Comfort One form is being replaced by the POLST form, but forms that are issued before January 1, 2010 will still be valid to allow for continuity of care with respect to DNR orders that are currently in effect. ARM 37.10.105 is being amended to reflect that POLST forms as well as Comfort One identifying material must still be obtained through specific authorized sources such as a hospital or a skilled nursing facility.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and no technical problems were noted.

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