



# Department of Public Health and Human Services

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Steve Bullock, Governor

Sheila Hogan, Director

November 22, 2017

**HAND DELIVERED AND SENT BY ELECTRONIC MAIL**  
**TO ASANDRU@MT.GOV**

Children, Families, Health, and Human Services Interim Committee  
c/o Legislative Services Division  
P.O. Box 201706  
Helena, MT 59620-1706

**RE: Department's Response to Objection of MAR Nos. 37-788, 37-801, 37-802, and 37-805**

Dear Committee Members:

The following responds to the Children, Families, Health, and Human Services Interim Committee's objection to MAR Notice Nos. 37-788, 37-801, 37-802, and 37-805 (hereinafter "the rule notices"), which the committee lodged pursuant to section 2-4-406, MCA. Enclosed with this letter, the Department of Public Health and Human Services submits the final notices for the rule notices, which the Department will file with the Secretary of State's Office on November 27, 2017.

On June 26, 2017, the Department filed the rule notices proposing to change provider rates for Medicaid and non-Medicaid services, including rates for Medicaid waiver programs and nursing home facilities. This is typically a routine matter that the Department proposes each year in order to adjust Medicaid and non-Medicaid provider rates based on appropriations by the Montana Legislature.

For the first time in at least a decade, however, rates for Montana providers would have to be reduced in fiscal year 2018-19 because of legislatively mandated reductions in the Department's budget.

Although the 65<sup>th</sup> Montana Legislature had passed House Bill 2 and appropriated expenditures for state agencies for the next biennium, the Department's budget was far

from certain. In addition to mandated reductions in agency base budgets, the legislature imposed the possibility of additional funding reductions for state agencies predicated on whether or not the state received tax and other revenue in specific amounts at specific dates in the future. One legislatively established benchmark would occur on August 15, 2017, nearly one and a half months after the Department filed the rule notices.

Nonetheless, it was incumbent upon the Department to implement the provider rate changes as soon as possible because any delay in implementing rate reductions would serve only to create an additional budget shortfall for the Department and possibly compel the Department to propose further rate cuts due to a shortened timeframe over which the reductions could be realized. Until the reduced rates are implemented, the Department continues to pay providers at rates unsupported by the current appropriations.

The rule notices proposed amending the administrative rules that govern Medicaid and non-Medicaid provider rates, proposing a 3.47% reduction in provider rates from the year's rates.

After receiving written comments objecting to the rate reduction, the Department announced its intention to amend the proposed rate reduction from a 3.47% reduction to a 2.99% reduction to current provider rates. As explained in the enclosed final notices, the Department was able to reduce the rate reduction to 2.99% by limiting the rate decreases to the following two appropriation reductions actions passed by the 2017 legislature: a) SB 261 Section 21, and b) the Medicaid share of SB 261 Section 12. The 2.99% rate reduction was based on the assumption that the new rates would take effect January 1, 2018.

The following provides the Department's response to each of the reasons on which the interim committee's objection is based. For the reasons set forth below, the Department's rule notices comport with the requirements of the Montana Administrative Procedure Act (MAPA), and the Department respectfully requests the interim committee withdraw its objection.

### Reasonable Necessity

In order to be valid, a rule must be adopted in substantial compliance with sections 2-4-302, 2-4-303 or 2-4-306 and 2-4-305, MCA. Mont. Code Ann. § 2-4-305(7). "Substantial compliance" means whether a statute has been followed sufficiently so as to carry out the intent for which it was adopted. *Mont. Soc'y of Anesthesiologists v. Mont. Bd. of Nursing*, 2007 MT 290, ¶ 52, 339 Mont. 472, 171 P.3d 704 (rulemaking affirmed where state agency gave notice of governmental action and opportunity to be heard).

The intent or purpose of MAPA is "to give notice of governmental action and the opportunity to express one's opinion regarding that action." *Id.* ¶ 52, citing *House Joint Resolution 2* (adopted by the 49<sup>th</sup> Legislature of the State of Montana) (March 9, 1985).

Accordingly, the Department's statements of reasonable necessity provided the public with notice of the action it intended to take – provider rate reductions in an amount 3.47% less than current rates – and also provided the public with the opportunity to express opinions regarding the action, both in writing and in person at the July 27, 2017, public hearings. Additionally, MAR Notice No. 37-788 articulated the rationale for the rate reductions contained in that notice, including the need to:

- 1) Reflect the re-basing of the Resource Based Relative Value Scale reimbursement methodology used by several divisions in the Department;
- 2) Reflect the re-basing of the All Patient Refined Diagnosis Related Groups reimbursement methodology for inpatient hospital services used by several divisions in the Department;
- 3) Reflect appropriation reductions mandated by House Bill 2 adopted by the regular session of the 65<sup>th</sup> Legislature;
- 4) Reflect the mandated legislative reductions required to comply with Senate Bill 261 if revenue projections do not meet certain levels on August 15, 2017;
- 5) Comply with the increase to the conversion factor in the physician fee in compliance with House Bill 639 and as codified at 53-6-125;
- 6) Update and reflect current pharmacy dispensing fee practice;
- 7) Update descriptive Medicaid terminology; and

- 8) Remove references to Targeted Case Management for adults with severe mental illness, children with serious emotional disturbance, and children and adults with substance use disorder from the 37-788 rules.

*See* MAR Notice No. 37-788.

The Department's statements of reasonable necessity provided rule by rule explanations for each and every one of the changes that were proposed in the rule notices. Finally, the rule notices provided an explanation of the effect the proposed rate reductions would have on each of the provider types, leaving no doubt about the Department's intended action so that interested persons would have the opportunity to express an opinion or make an objection. *Id.* ¶ 53.

Contrary to the interim committee's objection letter, MAPA does not require the Department to speculate as to each and every possible objection that may be raised and then demonstrate in the initial rule notice why it is taking the proposed course of action "as opposed to making reductions elsewhere." *See Interim Committee Letter*, Nov. 8, 2017. MAPA contemplates a collaborative process whereby interested persons may comment on the proposed governmental action, and the state agency responds to the comments. And, the MAPA process does not require an agency to generate a fiscal note, as occurs in the legislative process and set forth in section 5-4-201, MCA. Rather, MAPA's requirements relating to monetary disclosures are limited to sections 2-4-302(1)(c), 2-4-111, and 2-4-405, MCA.

For these reasons, the Department is confident that reasonable necessity for the proposed provider rates has been sufficiently demonstrated in the rule notices. The Department respectfully requests the committee withdraw its objection.

#### Statutory Authority

This objection is based on section 53-6-101(2), MCA, which sets forth the principles the Department and the legislature must consider "when considering changes in Medicaid policy *that either increase or reduce services...*" Mont. Code Ann. § 53-6-101(2).

The rule notices in question here do not propose to “increase or reduce” services to Medicaid members.<sup>1</sup> Rather, the rule notices propose to change the rates the Department pays to providers. There is nothing in the notices that proposes to reduce – or increase for that matter – Medicaid services. Thus, the statutory basis for this objection is inapplicable, and there is no legal basis for the interim committee to base an objection on section 53-6-101(2), MCA.

Even considering this argument, this objection is based on three statutory subsections and fails to consider all other statutory provisions, including those that obligate the Department to manage its budget in a manner that ensures that public funds are appropriately used. The operative statute here is section 53-6-112(3), MCA, which provides specific authority to the Department to establish provider rates and states as follows:

The department shall establish by rule the rates for reimbursement of services provided under this part. The department may in its discretion set rates of reimbursement that it determines necessary for the purposes of the program. In establishing rates of reimbursement, the department may consider but is not limited to considering:

- (a) *the availability of appropriated funds;*
- (b) the actual cost of services;
- (c) the quality of services;
- (d) the professional knowledge and skills necessary for the delivery of services; and
- (e) the availability of services.

Mont. Code Ann. § 53-6-112(3) (emphasis added).

The Department calculated its proposed provider rates based on “the availability of appropriated funds” by the 65<sup>th</sup> Legislature and thus, the proposals in MAR Notice Nos. 37-788, 37-801, 37-802, and 37-805 comport with legislative intent and statutory authority.

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<sup>1</sup> The notices propose to relocate the administrative rule for targeted case management fee schedules from ARM 37.87.105 and create a new rule. See, MAR Notice Nos. 37-788 and 37-801.

Conclusion

For these reasons, the Department respectfully requests the interim committee withdraw its objection under section 2-4-406, MCA or, in the alternative, find that the Department's proposed amendment to implement the lowered reduction of 2.99% in provider rates makes the rule comply with the committee's objection and concerns.

Sincerely,

A handwritten signature in blue ink that reads "Sheila Hogan". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Sheila Hogan, Director  
Montana DPHHS

c: DPHHS Office of Legal Affairs