



Children, Families, Health, and Human Services Interim Committee

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65th Montana Legislature

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August 28, 2018

To: Children, Families, Health, and Human Services Interim Committee
From: Alexis Sandru, Staff Attorney
Re: ARM Review -- Compilation of E-mail Summaries -- MAR Issues 12 through 16 (2018)

The Children, Families, Health, and Human Services Interim Committee is responsible for reviewing administrative rules promulgated by the Department of Public Health and Human Services (DPHHS) and the entities attached to DPHHS for administrative purposes for compliance with the Montana Administrative Procedure Act. At its June 2017 meeting, the Committee elected to receive bimonthly e-mails from staff that summarize DPHHS rulemaking activity and any issues noted in rule review. This paper is a compilation of those summaries that were prepared since the Committee's June 2018 meeting.

PROPOSAL NOTICES

MAR Notice Number: 37-822

Subject: Updates to emergency medical service (EMS) records and reports

Summary: The Department is proposing to amend EMS application and license renewal processes to require that applications be filed using a web-based electronic form. The Department is proposing to require that license renewals be submitted 15 days prior to expiration of the license (ARM currently provides 30 days) and that licensees update any changes to their license application within 10 business days of the change. The Department is also proposing to update the software used for data reporting and for completion and submission of patient care records.

The Department anticipates minimal fiscal impact associated with the software update because the software has been purchased with grant funds and is available at no cost to all EMS services.

Notes/Hearing: A public hearing was initially scheduled for July 26, 2018. Public comment was initially due on August 3, 2018. **See changes below. **Section 50-6-323, MCA, requires that, in order for the rules to be effective, notice of the proposed rules and public hearing must be sent to persons licensed under 50-6-306, MCA, at least 30 days prior to the date of the public hearing. I emailed the agency rule reviewer to confirm that this requirement has been met. (Subsequently received response from the Department that the requirement had not been met.)

Amendment Notes: In order to comply with the requirements under 50-6-323, MCA, the Department rescheduled the public hearing to August 20, 2018. The public comment deadline was extended to August 24, 2018.

MAR Notice Number: 37-846

Subject: Low Income Weatherization Assistance Program (LIWAP) amendments

Summary: The Department is proposing the following amendments to LIWAP:

- revising the weatherization priority to give priority to the elderly, persons with a disability, and children (ARM currently gives priority to elderly and handicapped low-income persons);
- inserting several new definitions;
- providing that highest priority is given to households with the highest energy burden and providing the formula for calculating the energy burden;
- adopting and incorporating by reference: (1) the 2018 Weatherization Assistance Program Policy Manual, which outlines the circumstances that justify a deferral of weatherization services; (2) 10 CFR 440 (2018); and (3) the National Renewable Energy Laboratory Standard Work Specifications (2018).

Notes/Hearing: A public hearing is scheduled on August 30, 2018, at 11 a.m. in Room 207 of the DPHHS building located at 111 North Sanders, Helena, Montana. Public comment is due by 5 p.m. on September 7, 2018.

MAR Notice Number: 37-848

Subject: Low Income Energy Assistance Program (LIEAP) amendments

Summary: The Department is proposing the following amendments to LIEAP, which helps low-income households with home heating costs:

- updating the LIEAP Benefit Award Matrix for the 2018-2019 heating season;
- using 2018-2019 federal poverty guidelines to determine eligibility for LIEAP;
- revising the nonbusiness resource limits to adjust for inflation;
- changing household income eligibility from income based on 12 months to income based on 6 months annualized. The Department states that this will allow more households to qualify for LIEAP and will expedite the issuance of benefits.
- adding a definition of the term "child";
- per federal law, removing state-funded programs, such as county or tribal general assistance, as designated categorically eligible programs; and
- repealing current language in rule that allows LIEAP benefits to be denied if weatherization services are refused.

The Department states that LIEAP is 100% federally funded.

Notes/Hearing: A public hearing is scheduled on August 30, 2018, at 11:30 a.m. in Room 207 of the DPHHS building located at 111 North Sanders, Helena, Montana. Public comment is due by 5 p.m. on September 7, 2018.

MAR Notice Number: 37-850

Subject: Pools, spas, and other water features

Summary: The Department is proposing to repeal existing rules pertaining to public swimming pools and to replace them with new rules that will adopt and incorporate by reference the following:

- the International Swimming Pool and Spa Code (2015), which, the Department states,

"sets forth design, construction, alteration, repair, and maintenance standards for public swimming pools";

- the American National Standard for Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs, and Catch Basins (2013); and
- Circular FCS 3-2018, which the Food and Consumer Safety Section of the Department has prepared regarding the requirements for operating and maintaining public swimming pools.

The Department states that the updates are necessary to align with building standards adopted by the Department of Labor and Industry and because the existing rules are outdated and do not represent the most recent standards in pool construction and safety. The Department anticipates no fiscal impact.

Notes/Hearing: A public hearing was held on August 13, 2018. Public comment was due on August 17, 2018. **Emailed agency rule reviewer re: incorrect auth/imp citations for the proposed new rules and erroneous citation to a renumbered statute in the auth/imp citations for an existing ARM that is being amended.

MAR Notice Number: 37-858

Subject: Federal Child Care and Development Block Grant Reauthorization Act requirements for child care facilities

Summary: The Department is proposing amendments to licensing requirements for child care facilities in order to substantially comply with the federal Child Care and Development Block Grant Reauthorization Act. Proposed amendments include:

- amending definitions of assistant teacher and teacher to allow for flexibility in staffing and to clarify to which staff requirements apply;
- requiring ongoing health and safety training;
- requiring that staff receive satisfactory background check results prior to working in a facility; and
- requiring more comprehensive background check procedures and criminal history analysis for providers, staff, and persons residing in or who are regularly present around child care facilities.

The Department states that there is no direct, determinable fiscal impact. However, providers may have increased costs if they elect to pay for fingerprint and background checks for their staff.

Notes/Hearing: A public hearing is scheduled on August 31, 2018, at 1:30 p.m. in the auditorium of the DPHHS building located at 111 North Sanders, Helena, Montana. Public comment is due by 5 p.m. on September 10, 2018. **Erroneous auth. citation to 53-4-503, MCA. Emailed agency rule reviewer.

OTHER NOTICES

MAR Notice Number: 37-843 -- **WITHDRAWN**

Subject: Durable medical equipment (DME) -- nursing facility services

Summary: The Department noted that in February 2016, CMS revised federal regulations to

require that state Medicaid programs pay for DME supplied to nursing facility residents out of the Medicaid nursing facilities program rather than from the DME program. The proposed amendments provided that DME supplied to nursing facility residents will no longer be paid through the DME program and will now be paid from the nursing program. The Department also proposed amendments to reflect the Department's policy that Medicaid does not cover powered wheelchairs for nursing facility residents and to amend the definition of DME to include equipment and supplies for use in any setting in which normal life activities take place (ARM currently refers to a patient's home, residence, school, or workplace).

The Department stated that a fund transfer will take place between DME and nursing home services and anticipated no fiscal impact.

Notes/Hearing: A public hearing was held on May 31, 2018. Public comment was due on June 8, 2018. ****Implementing cites contain citation to statute that has been repealed.** Emailed agency rule reviewer.

Decision Notes: The Department is withdrawing the proposed rules in order to reassess the proposals related to DME.

MAR Notice Number: 37-851 -- WITHDRAWN

Subject: Updating Medicaid fee schedules and effective dates -- private duty nursing

Summary: The Department proposed to increase private duty nursing fees as follows:

- \$8.95 per 15 minutes of care by a licensed practical nurse (currently reimbursed at \$7.38 per 15 minutes of care); and
- \$11.28 per 15 minutes of care by a registered nurse (currently reimbursed at \$8.69 per 15 minutes of care).

The Department intended for the changes to go into effect July 1, 2018. The expected fiscal impact was \$393,600.02 in state general fund and \$764,730.14 in federal funding (Health Resources Division) and \$8,411 in state general fund and \$16,344 in federal funding (Addictive and Mental Disorders Division).

Notes/Hearing: The public hearing scheduled on June 28, 2018, was vacated. The Department withdrew the notice because it needs to include additional provisions for private duty nursing within the Senior and Long Term Care Division (see MAR Notice No. 37-854).

MAR Notice Number: 37-859 **WITHDRAWN**** (see notes below)

Subject: Medicaid and non-Medicaid fee schedules

Summary: The Department proposed to increase a number of provider rates in order to reverse the across-the-board provider rate reductions that were implemented in FY 2018 by distributing \$5,085,784 of SB 9 (2017 special session) general fund budget restoration over a period of 10 months. The Department also proposed:

- to adopt a new version of the APR-DRG grouper, including increasing hospital base rates to meet the appropriated budget for inpatient hospitals and increasing the conversion factor for outpatient hospitals;
- to increase fee schedules for certain durable medical equipment; and
- to reinstate high cost, extensive dental procedures and dentures, which were cut from the adult dental package earlier this year.

For a comprehensive list of the providers and services affected, see the proposal notice. The Department anticipated the following fiscal impact to the following divisions:

- Health Resources: \$8,115,553 state funds & \$15,435,093 federal funds;
- Senior & Long Term Care: \$1,821,425 state funds & \$3,464,195 federal funds;
- Addictive & Mental Disorders: \$960,784 state funds & \$1,827,329 federal funds; and
- Disability Services: \$5,568,890 state funds & \$10,341,793 federal funds.

Decision Notes: The Department withdrew the proposed rulemaking. The public hearing scheduled to be held on August 30, 2018, has been vacated. The Department provided the following justification for the withdrawal:

At this time, the department is withdrawing MAR Notice No. 37-859 from consideration. Since the filing of this notice the department has been served a temporary restraining order requiring the department raise rates effective August 2, 2018. The department is interested in two outcomes: 1) ensuring that providers will not have to return the temporary rate increase when the injunction expires; and 2) raising provider rates as early as possible in state fiscal year 2019. Therefore, the department is withdrawing MAR Notice No. 37-859 from consideration. The department will file a replacement notice of proposed rulemaking on August 28, 2018 that will propose to raise rates effective July 1, 2018 by 2.99%.

MAR Notice Number: 37-861 ****WITHDRAWN** (see notes below)

Subject: Nursing facility reimbursement rates for FY 2019

Summary: The Department proposed to raise the nursing facility rate by 3.56% to reverse the across-the-board provider rate reductions implemented in FY 2018.

The Department stated that the proposed amendment increases expenditures in the nursing home program in FY 2019 by \$2,055,776 in state funds and \$3,834,712 in federal funds.

Decision Notes: The Department withdrew the proposed rulemaking. The public hearing scheduled to be held on August 31, 2018, has been vacated. The Department provided the following justification for the withdrawal:

At this time, the department is withdrawing MAR Notice No. 37-861 from consideration. Since the filing of this notice the department has been served a temporary restraining order requiring the department raise rates effective August 2, 2018. The department is interested in two outcomes: 1) ensuring that providers will not have to return the temporary rate increase when the injunction expires; and 2) raising provider rates as early as possible in state fiscal year 2019. Therefore, the department is withdrawing MAR Notice No. 37-861 from consideration. The department will file a replacement notice of proposed rulemaking on August 28, 2018 that will propose to raise rates effective July 1, 2018 by 2.99%.

ADOPTION NOTICES

MAR Notice Number: 37-826

Subject: Adoption of a new rule pertaining to Medicaid auditor evaluations

Summary: The Department proposed to adopt a new rule that would establish auditor evaluation hearing meetings to provide an opportunity for Medicaid providers and the Department to discuss appropriate conduct and determinations by contract auditors. The Department stated that the new rule was necessary to implement portions of SB 82 (2017) (codified as 53-6-1409, MCA), which requires the Department to provide greater clarity and transparency regarding its integrity reviews. Note: The statute requires the Department to hold auditor evaluation hearings and, based on input gathered from providers, adopt rules for appropriate and inappropriate conduct and determinations by auditors and penalties and sanctions for inappropriate conduct and determinations.

The Department did not anticipate any fiscal impact and intended to apply the rule adoption retroactively to July 1, 2017.

Notes/Hearing: A public hearing was held on May 16, 2018. Public comment was due by on May 24, 2018.

Adoption Notice Notes: The Department received one comment in support of the rule and adopted the rule as proposed.

MAR Notice Number: 37-834

Subject: Update of the Healthcare Effectiveness Data and Information Set (HEDIS)

Summary: Under the Managed Care Plan Network Adequacy and Quality Assurance Act, Title 33, chapter 36, MCA, the Department is required to evaluate quality assurance activities of health carriers providing managed care plans in Montana. Administrative rule requires health carriers to report their quality assessment activities using HEDIS measures, which are nationally utilized and updated annually. The Department proposed to adopt the 2018 HEDIS measures.

Notes/Hearing: A public hearing was not held. Public comment was due on May 25, 2018.

Adoption Notice Notes: The Department received no public comment and amended the rule as proposed. The Department intends to apply the amendment retroactively to January 1, 2018.

MAR Notice Number: 37-837

Subject: Implementation of amendments to the Child Care and Development Block Grant Act and final rules

Summary: DPHHS administers the Best Beginnings Child Care Scholarship Program (Program), which offers child care assistance to low-income families with working parents, families referred by TANF, and children with CPS. The Department proposed the following changes to the Program:

- adopt a new rule that will discontinue the Department's current practice of paying some Head Start providers as child care providers for some preschool program hours. Under the new rule, payments cannot be made for preschool program hours.
- adopt a new rule that will limit payment for in-home care to children with disabilities or special needs, children of a teen parent, or children of a parent who works non-traditional

- hours;
- revise the Child Care Policy Manual;
 - add a household experiencing homelessness as a priority group if there are insufficient funds to provide benefits to all eligible households;
 - revise payment rates to eliminate the current rate structure of 14 rates and replace it with one statewide rate and reimburse on a part-time or full-time basis;
 - clarify which child care providers are eligible for payment for absent days;
 - provide requirements for the timeline in which a provider must submit an invoice; and
 - clarify when child care assistance can be terminated, including now allowing for a grace period if a parent is not meeting an activity requirement.

The Department did not anticipate a fiscal impact to the state. Small businesses may be significantly and directly impacted by the rulemaking.

Notes/Hearing: A public hearing was held on May 3, 2018. Public comment was due on May 11, 2018.

Adoption Notice Notes: The Department received numerous comments, mainly concerning the description of a "public preschool", preschool reimbursement, and the statewide child care reimbursement rate and seeking clarification regarding the rules. Other than amending the description of a public preschool setting, the Department amended and adopted the rules as proposed.

MAR Notice Number: 37-840

Subject: Medicaid outpatient drug services

Summary: The Department proposed to amend rules pertaining to Medicaid outpatient drug services in order to correct citations cross-referenced in the rules and to provide that *all* pharmacy providers (ARM currently refers to "[in-state] pharmacy providers") that are new to the Medicaid program are assigned the maximum dispensing fee until a dispensing fee questionnaire can be completed for six months of operation. The Department stated that this amendment was necessary to comply with the approved pharmacy state plan.

The Department did not anticipate any fiscal impact with the proposed amendments and anticipated that the amendments would be effective July 1, 2018.

Notes/Hearing: A public hearing was held on May 31, 2018. Public comment was due on June 8, 2018.

Adoption Notice Notes: The Department received no public comment and amended the rules as proposed. The amendments apply retroactively to July 1, 2018.

MAR Notice Number: 37-841

Subject: Amendment of Healthy Montana Kids (HMK) dental benefits

Summary: The Department proposed to amend the HMK dental benefit to follow the State of Montana employee dental benefits, which is the benchmark approved by CMS in the CHIP state plan. The Department stated that the amendments were necessary to comply with federal funding requirements. The Department anticipated no fiscal impact and intended for the amendments to go into effect July 1, 2018.

Notes/Hearing: A public hearing was held on May 17, 2018. Public comment was due on May

25, 2018.

Adoption Notice Notes: The Department received no public comment and amended the rule as proposed. The amendment is effective July 1, 2018.

MAR Notice Number: 37-842

Subject: Hospice reimbursement and updates

Summary: The Department proposed the following amendments pertaining to hospice:

- specifying that an original or copy of a notice of election must be filed for Medicaid hospice services within 5 calendar days of the start of Medicaid hospice services (ARM currently provides that the notice must be filed with the Department within 5 calendar days after the effective date of the election statement); and
- updating the hospice fee schedule, effective October 1, 2017. The Department stated that the proposed amendment is in accordance with changes in the federal hospice reimbursement rates set by CMS and that the proposed fee schedule implements an approximate aggregate reimbursement rate increase of 1%, which equals approximately \$53,000. The Department noted that hospice rates are affected by a wage index applied geographically by county. All Montana counties except for Missoula (2.2% decrease) and Cascade (20.9% decrease) Counties experienced an increase in the wage index. Cascade and Missoula Counties will experience a reduction in hospice reimbursement rates.

Notes/Hearing: A public hearing was held on May 31, 2018. Public comment was due on June 8, 2018.

Adoption Notice Notes: The Department received no public comment and amended the rules as proposed.

MAR Notice Number: 37-844

Subject: Amendment of Healthy Montana Kids (HMK)

Summary: The Department proposed the following revisions to the HMK health care benefit plan:

- removing the limits on the extended mental health benefit;
- moving administration of the community-based psychiatric rehabilitation and support benefit from the Medicaid fiscal agent to the HMK third-party administrator;
- eliminating prior authorization for dental anesthesia and implants and clarifying the dental anesthesia benefit;
- removing the exclusion for transgender services; and
- providing contact information for the ambulance benefit administration.

The Department anticipated that removing the limits on the extended mental health benefit will cost the Department \$164,187 annually and that the remaining changes will not have an impact to the state general fund. The Department intended to apply the amendments retroactively to November 1, 2017.

Notes/Hearing: A public hearing was held on June 14, 2018. Public comment was due on July 6, 2018.

Adoption Notice Notes: The Department received one comment in support of the amendment and amended the rule as proposed. The amendment will apply retroactively to November 1,

2017.

MAR Notice Number: 37-845

Subject: Nursing facility reimbursement rates for SFY 2019

Summary: The Department proposed an increase of 6.34% in nursing facility provider rates for SFY 2019 and proposed to repeal a rule that applies to rates between January 1 and June 30, 2018. The Department intended for the rule amendments and repeal to be effective July 1, 2018.

Notes/Hearing: A public hearing was held on June 14, 2018. Public comment was due on June 22, 2018.

Adoption Notice Notes: The Department received numerous comments, mainly concerning the adequacy of the reimbursement rate and the methodology used to calculate the rate. The Department amended and repealed the rules as proposed, stating that "[the] proposed rate represents an 8.2 percent increase over the rates established on January 1, 2018. This rate increase complies with the combined requirements of HB 2, SB 261, and HB 618".

MAR Notice Number: 37-852

Subject: Home and community-based services (HCBS) waiver programs

Summary: The Department proposed to adopt and incorporate by reference a revised version of the Montana Developmental Disabilities Program Manual of Service Rates and Procedures of Reimbursement for HCBS 1915c, 0208, and 0667 Waiver Programs, effective July 1, 2018.

Revisions to the manual included:

- discontinuing children's case management, live-in caregiver service, job discovery and job preparation, and adaptive equipment (the Department stated that these services are either being provided under another service or are not in use);
- expanding equipment and supplies;
- expanding companion services to younger individuals;
- expanding psychological and counseling services to include evaluation and consultation;
- increasing the private duty nursing rate, effective July 15, 2018; and
- clarifying requirements for several services.

The Department anticipated that the increase in the private duty nursing rate will increase total expenditures to providers for FY 2019 by \$247,807.96 and will affect 15 corporate providers of services.

Notes/Hearing: A public hearing was held on July 12, 2018. Public comment was due on July 20, 2018.

Adoption Notice Notes: The Department received no public comment and amended the rule as proposed. The private duty nursing rate took effect retroactively on July 15, 2018. The other changes took effect retroactively on July 1, 2018.

MAR Notice Number: 37-853

Subject: Update of federal poverty index guidelines for the Montana Telecommunications Access Program (MTAP)

Summary: The Department proposed to update poverty guidelines for the MTAP to replace 2017 federal poverty guidelines with 2018 federal poverty guidelines. The Department anticipated no

fiscal impact.

Notes/Hearing: A public hearing was not scheduled. Public comment was due on July 20, 2018.

Adoption Notice Notes: The Department received no public comment and amended the rule as proposed. The amendment will apply retroactively to February 2, 2018.

MAR Notice Number: 37-854

Subject: Updating Medicaid fee schedules and effective dates -- private duty nursing

Summary: The Department proposed to increase the reimbursement rate for private duty nursing in the following programs:

- Health Resources Division, effective July 1;
- Senior and Long Term Care Division -- HCBS for elderly and physically disabled persons, effective July 15; and
- Addictive and Mental Disorders Division -- HCBS for adults with severe disabling mental illness, effective July 15.

The proposed rate increase is \$8.95/ 15 minutes of care by an LPN (currently \$7.38); \$11.28/ 15 minutes of care by an RN (currently \$8.69); and \$15.31/ 15 minutes of care by an RN supervisor (currently \$11.78).

The Department anticipated the following fiscal impact:

- Health Resources Division: \$393,600 general fund & \$764,730 federal funds;
- Addictive and Mental Disorders Division: \$8,411 general fund & \$16,344 federal funds; and
- Senior and Long Term Care Division: \$175,404 general fund & \$340,794 federal funds.

Notes/Hearing: A public hearing was held on July 12, 2018. Public comment was due on July 20, 2018.

Adoption Notice Notes: The Department received two comments in support of the rate increase and amended the rule as proposed. The Department noted that the fiscal impact to Health Resources Division was revised to \$209,785 in state general fund and \$407,592 in federal funds.

MAR Notice Number: 37-855

Subject: Financial assistance for children and youth with special health care needs

Summary: The Department proposed extensive amendments to the Children's Special Health Services Program. The Department noted that the program's \$100,000 annual budget has not been expended in recent years because the rules as currently written are too restrictive. The proposed amendments relax many current restrictions and would allow for the reimbursement of enabling services in addition to treatment services.

Notes/Hearing: A public hearing was held on July 26, 2018. Public comment was due on August 3, 2018.

Adoption Notice Notes: The Department received no public comment and amended and repealed the rules as proposed. The Department intends to apply the changes retroactively to August 1, 2018.