

## 1 HOUSE BILL NO. 237

2 INTRODUCED BY A. OLSZEWSKI

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING STANDARDS AND REQUIREMENTS FOR MEDICAID  
5 OVERPAYMENT AUDITS; PROVIDING REQUIREMENTS FOR RECORD REQUESTS AND REVIEWS;  
6 PROHIBITING EXTRAPOLATION AND STATISTICAL SAMPLING; PROVIDING FOR NOTICE OF AUDIT  
7 RESULTS; PROVIDING DEFINITIONS; REQUIRING THE PUBLICATION OF AUDIT RESULTS; PROVIDING  
8 RULEMAKING AUTHORITY; AMENDING SECTIONS 53-6-111, 53-6-155, AND 53-6-160, MCA; AND  
9 PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

10

11 WHEREAS, a strong Medicaid overpayment audit program is essential to ensure that Medicaid funds are  
12 paid for appropriate and necessary health care services and to identify and address instances of overpayment  
13 and underpayment and cases of provider fraud and abuse; and

14 WHEREAS, the vast majority of providers deliver appropriate and necessary services to recipients in  
15 compliance with Medicaid requirements; and

16 WHEREAS, despite the diligence and good faith efforts of providers, errors and mistakes may be made  
17 by providers or the Medicaid program that result in underpayments or overpayments; and

18 WHEREAS, underpayment and overpayment errors should be addressed in a reasonable, efficient, and  
19 fair manner, providing for adjustment and recovery as appropriate, while continuing to ensure that fraud and  
20 abuse are detected and pursued; and

21 WHEREAS, providers should be encouraged to participate in the Medicaid program to ensure that  
22 recipients have adequate and timely access to quality health care services; and

23 WHEREAS, audit standards that are reasonable and fair will eliminate a disincentive for providers to  
24 participate in the Medicaid program; and

25 WHEREAS, providers are subject to numerous audits from state and federal health agencies, resulting  
26 in increased administrative costs that raise the costs for all health care consumers; and

27 WHEREAS, in addition to other audit and recovery programs, states are required to implement provisions  
28 of the Patient Protection and Affordable Care Act, Public Law 111-148 and Public Law 111-152, relating to  
29 Medicaid recovery audit contractors.

30 THEREFORE, the Legislature of the State of Montana finds that providing balance and predictability in

1 the overpayment audit and recovery process by implementing reasonable and consistent standards, rules, and  
2 limitations on overpayment audit activities encourages providers to participate in the Medicaid program and is  
3 necessary and in the best interest of this state.

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5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

6

7 **NEW SECTION. Section 1. Applicability to auditor -- scope.** (1) An auditor performing or participating  
8 in an overpayment audit, overpayment determination, or related activity is subject to the same laws and  
9 regulations that would apply to the department in carrying out the same functions.

10 (2) [Sections 1 through 7] do not apply to the medicaid fraud control unit provided for in 53-6-156, but  
11 shall apply to an overpayment audit, overpayment determination, or related activity by the department or an  
12 auditor that is based on or arises out of a medicaid fraud control unit investigation or referral.

13

14 **NEW SECTION. Section 2. Provider records -- limitations on record requests and reviews --**  
15 **onsite audits.** (1) In an overpayment audit, the department or an auditor shall:

16 (a) give the provider at least 45 days to comply with a request to provide records and allow reasonable  
17 extensions for good cause;

18 (b) include in a request for records adequate information, including the claim number, medical record  
19 number, name of the patient, and service dates, to allow the provider to identify the particular records sought; and

20 (c) allow providers to submit the requested records in an electronic format.

21 (2) In an overpayment audit conducted by an auditor, if a provider is required to provide records in a  
22 nonelectronic manner because an electronic format is not available or because the auditor requested a  
23 nonelectronic format, the auditor shall reimburse the provider for the cost of providing the records.

24 (3) (a) The department or an auditor may request records from the same provider for overpayment audit  
25 purposes:

26 (i) not more than once in any 90-day period; and

27 (ii) for not more than the lesser of:

28 (A) 1% of the number of claims filed by the provider in the previous state fiscal year for the specific  
29 service being reviewed; or

30 (B) 200 claims.

1 (b) If the department or an auditor demonstrates a significant overpayment rate, the department or the  
2 auditor with the department's approval may request additional records that are related to the issue under review.  
3 The additional records may not be requested until the time period to request an administrative review has expired  
4 without the provider requesting administrative review or until an administrative review has been completed  
5 regarding the records initially provided, whichever occurs later. In an appeal involving an overpayment  
6 determination that is based on additional records that were provided pursuant to this subsection (3)(b), the  
7 additional records must be excluded from evidence if the provider demonstrates that the department did not  
8 demonstrate a significant overpayment rate necessary to request additional records.

9 (4) The department or an auditor may not request records or perform an overpayment audit regarding  
10 services that were provided outside the period of time for which providers are required to retain records. In  
11 addition, a recovery audit contractor may not request records or conduct an overpayment audit regarding services  
12 for which a claim was submitted more than 3 years before the request or audit.

13 (5) Except in cases of suspected fraud or criminal conduct, the department or an auditor may not  
14 schedule an onsite overpayment audit without first providing at least 30 days' advance written notice to the  
15 provider and making a good faith effort to establish a mutually agreed upon date and time for the onsite audit.

16 (6) For the purposes of this section, the term "claim" means a claim for a single line item, consisting of  
17 a single service, under one procedure rate with one or more units of service, procedure, or item on a claim form  
18 for which a provider has received payment.

19  
20 **NEW SECTION. Section 3. Extrapolation and statistical sampling prohibited.** The department or  
21 an auditor may not use extrapolation or statistical sampling in an overpayment audit for automated review to  
22 identify potential overpayments or to determine or support the amount of an overpayment determination. An  
23 overpayment determination must be based on and supported by evidence of an overpayment for each claim.

24  
25 **NEW SECTION. Section 4. Peer review of overpayment findings.** Any overpayment finding must be  
26 reviewed by a peer before the department or an auditor may issue an overpayment determination.

27  
28 **NEW SECTION. Section 5. Audit completion -- notice of overpayment determination.** (1) Except  
29 as provided in subsections (2) and (3), the department or an auditor shall conclude an overpayment audit and  
30 notify the provider in writing of the audit results, including any overpayment determination, within 60 days after

1 the receipt of all records requested in the department's or the auditor's initial record request.

2 (2) An overpayment audit may be extended beyond the 60-day period provided for in subsection (1) only  
3 if a delay is caused by the provider, in which case the period for completing the audit may be extended no longer  
4 than the period of the provider-caused delay. In an appeal of an overpayment determination, an overpayment  
5 determination made after the 60-day period provided for in subsection (1) must be excluded from evidence if the  
6 provider demonstrates that the delay was not caused by the provider and was not the result of the circumstances  
7 described in subsection (3).

8 (3) Notice of an overpayment determination must be provided within 60 days of:

9 (a) a determination regarding fraud in cases in which the department has a reasonable basis to suspect  
10 that fraud has occurred; or

11 (b) the conclusion of an investigation and any related enforcement proceedings, if a government agency  
12 or entity other than the department is conducting a civil fraud or criminal investigation of the provider, and the  
13 government agency or entity conducting the investigation determines and notifies the department in writing that  
14 providing earlier notification would interfere with or jeopardize the investigation, recovery of a fraudulent  
15 overpayment, or a criminal prosecution.

16 (4) Notice of an overpayment determination under this section must include a detailed explanation,  
17 including, at a minimum, the following:

18 (a) a description of the overpayment;

19 (b) the dollar value of the overpayment;

20 (c) the specific reason for the overpayment determination;

21 (d) the specific medical criteria, if any, on which the determination was based;

22 (e) if the department or auditor determines that a service was reasonable, necessary, and provided in  
23 accordance with applicable medicaid requirements but was improperly billed, an explanation of the appropriate  
24 reimbursement amount;

25 (f) the adverse action to be taken by the department;

26 (g) an explanation of any actions required of the provider; and

27 (h) an explanation of the provider's right to appeal.

28

29 **NEW SECTION. Section 6. Publication of audit results.** Twice a year, the department or an auditor  
30 shall publish and make accessible on its website the following information regarding overpayment audits:

- 1 (1) the number and type of issues reviewed;
- 2 (2) the number of medical and other records requested from providers;
- 3 (3) the number of audits conducted for each provider type;
- 4 (4) the number and aggregate dollar amounts of overpayments identified;
- 5 (5) the number and aggregate dollar amounts of overpayments collected;
- 6 (6) the number and aggregate dollar amounts of underpayments identified;
- 7 (7) the duration of audits from initiation to completion;
- 8 (8) the number of overpayment determinations and the reversal rates of those determinations at each
- 9 stage of the informal and formal appeal process;
- 10 (9) the number of informal and formal appeals filed by providers, categorized by disposition status; and
- 11 (10) the auditor's compensation structure and total dollar amount of compensation for underpayments
- 12 and overpayments.

13

14 **NEW SECTION. Section 7. Auditor evaluation hearings -- adoption of rules.** At least once a year,

15 the department shall conduct auditor evaluation hearings to identify issues, recommend or require corrective

16 actions, and provide for ongoing and future evaluation of auditor performance. With input from providers, including

17 input gathered at the auditor evaluation hearings, the department shall adopt rules addressing appropriate and

18 inappropriate conduct and determinations by auditors and providing penalties and sanctions for inappropriate

19 conduct and determinations by auditors.

20

21 **Section 8.** Section 53-6-111, MCA, is amended to read:

22 **"53-6-111. Department charged with administration and supervision of medical assistance**

23 **program -- overpayment recovery -- sanctions for fraudulent and abusive activities -- adoption of rules.**

24 (1) The department of public health and human services may administer and supervise a vendor payment

25 program of medical assistance under the powers, duties, and functions provided in Title 53, chapter 2, and this

26 chapter and that is in compliance with Title XIX of the Social Security Act.

27 (2) (a) The department is entitled to collect from a provider, and a provider is liable to the department

28 for:

29 (i) the amount of a payment under this part to which the provider was not entitled, regardless of whether

30 the incorrect payment was the result of department or provider error or other cause; and

1 (ii) the portion of any interim rate payment that exceeds the rate determined retrospectively by the  
2 department for the rate period.

3 (b) In addition to the amount of overpayment recoverable under subsection (2)(a), the department is  
4 entitled to interest on the amount of the overpayment at the rate specified in 31-1-106 from the date 30 days after  
5 the date of mailing of notice of the overpayment by the department to the provider, except that interest accrues  
6 from the date of the incorrect payment when the payment was obtained by fraud or abuse.

7 (c) In an overpayment determination involving reasonable and necessary services that were provided  
8 in accordance with applicable medicaid requirements but that were improperly billed, a provider must be allowed  
9 to retain the appropriate amount of reimbursement for the services provided.

10 ~~(e)~~(d) The department may collect any amount described in subsection (2)(a) by:

- 11 (i) withholding current payments to offset the amount due;
- 12 (ii) applying methods and using a schedule mutually agreeable to the department and the provider; or
- 13 (iii) any other legal means.

14 ~~(d)~~(e) The In cases of suspected fraud, the department may suspend payments to a provider for disputed  
15 items pending resolution of a dispute.

16 ~~(e)~~(f) The fact that a provider may have ceased providing services or items under the medical assistance  
17 program, may no longer be in business, or may no longer operate a facility, practice, or business does not excuse  
18 repayment under this subsection (2).

19 (3) The department shall adopt rules establishing a system of sanctions applicable to providers who  
20 engage in fraud and abuse. Subject to the definitions in 53-6-155, the department rules must include but are not  
21 limited to specifications regarding the activities and conduct that constitute fraud and abuse.

22 (4) Subject to subsections (5) and ~~(6)~~ (7), the sanctions imposed under rules adopted by the department  
23 under subsection (3) may include but are not limited to:

- 24 (a) required courses of education in the rules governing the medicaid program;
  - 25 (b) suspension of participation in the program for a specified period of time;
  - 26 (c) permanent termination of participation in the medical assistance program; and
  - 27 (d) imposition of civil monetary penalties imposed under rules that specify the amount of penalties
- 28 applicable to a specific activity, act, or omission involving intentional or knowing violation of specified standards.

29 (5) In all cases in which the department may recover medicaid payments or impose a sanction, a  
30 provider is entitled to a hearing under the provisions of Title 2, chapter 4, part 6. ~~This section does not require~~

1 ~~that the hearing under Title 2, chapter 4, part 6, be granted prior to recovery of overpayment. The department may~~  
 2 ~~not recover an overpayment until all formal hearings and appeals are exhausted, except in cases in which the~~  
 3 ~~department has a reasonable basis to suspect that the overpayment was a result of provider fraud.~~

4 (6) If the department, a hearings officer, or a court finds that an overpayment determination was  
 5 unreasonable, frivolous, or without merit, the provider must be reimbursed for costs and attorney fees incurred  
 6 in disputing the overpayment determination.

7 ~~(6)(7)~~ The remedies provided by this section are separate and cumulative to any other administrative,  
 8 civil, or criminal remedies available under state or federal law, regulation, rule, or policy."

9

10 **Section 9.** Section 53-6-155, MCA, is amended to read:

11 **"53-6-155. Definitions.** As used in this part, unless expressly provided otherwise, the following  
 12 definitions apply:

13 (1) "Abuse" means conduct by an applicant, recipient, provider, or other person involving disregard of  
 14 and an unreasonable failure to conform with the statutes, regulations, and rules governing the medical assistance  
 15 program when the disregard or failure results or may result in an incorrect determination that a person is eligible  
 16 for medical assistance or payment by a medicaid agency of medical assistance payments to which the provider  
 17 is not entitled.

18 (2) "Applicant" means a person:

19 (a) who has submitted an application for determination of medicaid eligibility to a medicaid agency on  
 20 the person's own behalf or on behalf of another person; or

21 (b) on whose behalf an application has been submitted.

22 (3) "Auditor" means an individual or entity, its agents, subcontractors, and employees that has contracted  
 23 with the department to perform overpayment audits with respect to the medicaid program. The term includes a  
 24 recovery audit contractor.

25 ~~(3)(4)~~ "Benefit" means the provision of anything of pecuniary value to or on behalf of a recipient under  
 26 the medicaid program.

27 ~~(4)(5)~~ "Claim" means a communication, whether in oral, written, electronic, magnetic, or other form, that  
 28 is used to claim specific services or items as payable or reimbursable under the medicaid program or that states  
 29 income, expense, or other information that is or may be used to determine entitlement to or the rate of payment  
 30 under the medicaid program. The term includes any documents submitted as part of or in support of the claim.

1           ~~(5)~~(6) "Department" means the department of public health and human services provided for in  
2 2-15-2201.

3           ~~(6)~~(7) "Document" means any application, claim, form, report, record, writing, or correspondence,  
4 whether in written, electronic, magnetic, or other form.

5           ~~(7)~~(8) "Fraud" means any conduct or activity prohibited by statute, regulation, or rule involving purposeful  
6 or knowing conduct or omission to perform a duty that results in or may result in medicaid payments or benefits  
7 to which the applicant, recipient, or provider is not entitled. Fraud includes but is not limited to any conduct or  
8 omission under the medicaid program that would constitute a criminal offense under Title 45, chapter 6 or 7.

9           ~~(8)~~(9) "Medicaid" means the Montana medical assistance program established under Title 53, chapter  
10 6.

11           ~~(9)~~(10) "Medicaid agency" means any agency or entity of state, county, or local government that  
12 administers any part of the medicaid program, whether under direct statutory authority or under contract with an  
13 authorized agency of the state or federal government. The term includes but is not limited to the department, the  
14 department of corrections, local offices of public assistance, and other local and state agencies and their agents,  
15 contractors, and employees, when acting with respect to medicaid eligibility, claims processing or payment,  
16 utilization review, case management, provider certification, investigation, or other administration of the medicaid  
17 program.

18           ~~(10)~~(11) "Misappropriation of patient property" means exploitation, deliberate misplacement, or wrongful  
19 use or taking of a patient's property, whether temporary or permanent, without authorization by the patient or the  
20 patient's designated representative. Misappropriation of patient property includes but is not limited to any conduct  
21 with respect to a patient's property that would constitute a criminal offense under Title 45, chapter 6, part 3.

22           (12) "Overpayment audit" means a review or audit by the department or an auditor of medical claims or  
23 other documents in which a purpose or potential result of the review or audit is an overpayment determination.  
24 The term does not include a review or audit by the medicaid fraud control unit.

25           (13) "Overpayment determination" means a determination by the department or an auditor that forms the  
26 basis for or results in the department:

27           (a) partially or completely reducing a medicaid payment to a provider for a claim;

28           (b) demanding that the provider repay all or a part of a payment for a claim; or

29           (c) using or applying any other method to recoup, recover, or collect from a provider all or part of a  
30 payment for a claim.



1           ~~(11)~~(14) "Patient abuse" means the willful infliction of physical or mental injury of a patient or  
2 unreasonable confinement, intimidation, or punishment that results in pain, physical or mental harm, or mental  
3 anguish of a patient. Patient abuse includes but is not limited to any conduct with respect to a patient that would  
4 constitute a criminal offense under Title 45, chapter 5.

5           ~~(12)~~(15) "Patient neglect" means a failure, through inattentiveness, carelessness, or other omission, to  
6 provide to a patient goods and services necessary to avoid physical harm, mental anguish, or mental illness when  
7 an omission is not caused by factors beyond the person's control or by good faith errors in judgment. Patient  
8 neglect includes but is not limited to any conduct with respect to a patient that would constitute a criminal offense  
9 under 45-5-208.

10           (16) "Peer" means a health care provider employed by or under contract with the department or an  
11 auditor who has substantially the same education and training, who provides or has provided substantially the  
12 same range of health care services, and who has the same license to practice in Montana as the provider who  
13 is the subject of an overpayment audit.

14           ~~(13)~~(17) "Provider" means an individual, company, partnership, corporation, institution, facility, or other  
15 entity or business association that has enrolled or applied to enroll as a provider of services or items under the  
16 medical assistance program established under this part.

17           ~~(14)~~(18) "Recipient" means a person:

18           (a) who has been determined by a medicaid agency to be eligible for medicaid benefits, whether or not  
19 the person actually has received any benefits; or

20           (b) who actually receives medicaid benefits, whether or not determined eligible.

21           ~~(15)~~(19) (a) "Records" means medical, professional, business, or financial information and documents,  
22 whether in written, electronic, magnetic, microfilm, or other form:

23           (i) pertaining to the provision of treatment, care, services, or items to a recipient;

24           (ii) pertaining to the income and expenses of the provider; or

25           (iii) otherwise relating to or pertaining to a determination of eligibility for or entitlement to payment or  
26 reimbursement under the medicaid program.

27           (b) The term includes all records and documents, regardless of whether the records are required by  
28 medicaid laws, regulations, rules, or policies to be made and maintained by the provider.

29           (20) "Recovery audit contractor" means a medicaid recovery audit contractor selected by the department  
30 to perform audits for the purpose of ensuring medicaid program integrity in accordance with 42 C.F.R., part 455."

1

2           **Section 10.** Section 53-6-160, MCA, is amended to read:

3           **"53-6-160. Truthfulness, completeness, and accuracy of submissions to medicaid agencies. (1)**

4 A person who submits to a medicaid agency an application, claim, report, document, or other information that is  
5 or may be used to determine eligibility for medicaid benefits, eligibility to participate as a provider, or the right to  
6 or the amount of payment under the medicaid program is considered to represent to the department, to the best  
7 of the person's knowledge and belief, that the item is genuine and that its contents, including all statements,  
8 claims, and representations contained in the document, are true, complete, accurate, and not misleading.

9           (2) (a) A provider has a duty to exercise reasonable care to ensure the truthfulness, completeness, and  
10 accuracy of all applications, claims, reports, documents, and other information and of all statements and  
11 representations made or submitted, or authorized by the provider to be made or submitted, to the department for  
12 purposes related to the medicaid program. The duty applies whether the applications, claims, reports, documents,  
13 other information, statements, or representations were made or submitted, or authorized by the provider to be  
14 made or submitted, on behalf of the provider or on behalf of an applicant or recipient being served by the provider.

15           (b) A provider has a duty to exercise reasonable care to ensure that a claim made or submitted to the  
16 department or its agents or employees for payment or reimbursement under the medicaid program is one for  
17 which the provider is entitled to receive payment and that the service or item is provided and billed according to  
18 all applicable medicaid requirements, including but not limited to identification of the appropriate procedure code  
19 or level of service and provision of the service by a person, facility, or other provider entitled to receive medicaid  
20 payment for the particular service.

21           (3) A person is considered to have known that a claim, statement, or representation related to the  
22 medicaid program was false if the person knew, or by virtue of the person's position, authority, or responsibility  
23 should have known, of the falsity of the claim, statement, or representation.

24           (4) A person is considered to have made or to have authorized to be made a claim, statement, or  
25 representation if the person:

26           (a) had the authority or responsibility to:

27           (i) make the claim, statement, or representation;

28           (ii) supervise another who made the claim, statement, or representation; or

29           (iii) authorize the making of the claim, statement, or representation, whether by operation of law, business  
30 or professional practice, or office policy or procedure; and

1 (b) exercised or failed to exercise that authority or responsibility and, as a direct or indirect result, the  
2 false statement was made, resulting in a claim for a service or item when the person knew or had reason to know  
3 that the person was not entitled under applicable statutes, regulations, rules, or policies to medicaid payment or  
4 benefits for the service or item or for the amount of payment requested or claimed.

5 (5) (a) There is an inference that a person who signs or submits a document to a medicaid agency on  
6 behalf of or in the name of a provider is authorized by the provider to do so and is acting under the provider's  
7 direction.

8 (b) For purposes of this section, the term "signs" includes but is not limited to the use of facsimile,  
9 computer-generated and typed, or block-letter signatures.

10 (6) The department shall directly or by contract provide a program of instruction and assistance to  
11 persons submitting applications, claims, reports, documents, and other information to the department concerning  
12 the completion and submission of the application, claim, report, document, or other information in a manner  
13 determined necessary by the department. A provider may reasonably rely on the instructions and advice provided  
14 by the department. The program must include:

15 (a) clear directions for the completion of applications, claims, reports, documents, and other information;

16 (b) examples of properly completed applications, claims, reports, documents, and other information;

17 (c) a method by which persons submitting applications, claims, reports, documents, and other  
18 information may, on a case-by-case basis, receive accurate, complete, specific, and timely advice and directions  
19 from the department before the completed applications, claims, reports, documents, and other information must  
20 be submitted to the department; and

21 (d) a method by which persons submitting applications, claims, reports, documents, and other  
22 information may challenge the department's interpretation or application of the manner in which the applications,  
23 claims, reports, documents, and other information must be completed.

24 (7) At least twice a year, the department and any auditor shall provide:

25 (a) educational and training programs for providers regarding a summary of audit results, common issues  
26 and problems, and mistakes identified through audits;

27 (b) a discussion of opportunities for improvement in provider performance related to claims billings and  
28 documentation; and

29 (c) information on the department's website regarding audit issues, including, at a minimum, the name  
30 and description of the audit issue, the type of provider, the review period, and any applicable policy related to the

1 issue.

2 ~~(7)~~(8) This section applies only for the purpose of civil liability under Title 53 and does not apply in a  
3 criminal proceeding."

4

5 NEW SECTION. Section 11. Codification instruction. [Sections 1 through 7] are intended to be  
6 codified as an integral part of Title 53, chapter 6, part 1, and the provisions of Title 53, chapter 6, part 1, apply  
7 to [sections 1 through 7].

8

9 NEW SECTION. Section 12. Effective date. [This act] is effective July 1, 2015.

10

11 NEW SECTION. Section 13. Applicability. [This act] applies to overpayment audits, record requests,  
12 and overpayment determinations made or commenced on or after [the effective date of this act].

13

- END -