



Children, Families, Health, and Human Services Interim Committee

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61th Montana Legislature

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TO: Committee members
FROM: Lisa Mecklenberg Jackson, Staff Attorney
RE: DPHHS Administrative Rule Activity
DATE: September 11, 2009

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/>)

Notices of Proposed Rules:

I.

MAR 2009 Issue No. 17 (September 10, 2009), MAR Notice 37-484, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed amendment of 11 rules pertaining to the Montana PharmAssist Program and Medicaid reimbursement rates for some services with rates not set under resource based relative value scale (RBRVS). A hearing will be held October 2, 2009, in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period runs until October 8, 2009. The proposed amendments to ARM 37.81.1002 and 37.81.1018 remove the requirement that pharmacists annually complete two hours of continuing education to participate in the PharmAssist Program (a program providing free in-depth consultation with licensed and credentialed participating pharmacists, which is open to all Montana citizens, regardless of age or income). The requirement is not needed because a pharmacist must complete 15 hours of continuing education to maintain his/her state license through the state board of pharmacy. The changes to the remaining rules are necessary to change the Medicaid reimbursement rates for some providers who rates are not set based on the RBRVS rate system and to increase provider rates by 2% based on the appropriation in HB 2, 2009. These include services for hearing aids, fees for filling prescriptions, home infusion therapy, eyeglasses, Early and Periodic Screening, Diagnostic and Treatment (EPSDT) for individuals under 21 nutrition and private duty nursing services, therapeutic youth group home services, transportation and per diem reimbursement, ambulance services, and capital expenses base prices for center for excellence hospitals. The department intends to apply the rule amendments retroactively to July 1, 2009.

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

II.

MAR 2009 Issue No. 16 (August 27, 2009), MAR Notice 37-483, NOTICE OF PROPOSED AMENDMENT -- the department has filed a NOTICE OF PROPOSED AMENDMENT in the matter of the proposed amendment of one rule pertaining to fee reduction for medical marijuana patients. No public hearing is contemplated. The comment period runs until September 28, 2009. The proposed rule amendment decreases the original application fee for registration as a medical marijuana patient or caregiver from \$50 to \$25 and the renewal fee from \$50 to \$10. The decrease is proposed because the revenue received by the program is no longer cost-neutral due to the continued increase in qualified patients and caregivers. Using the current trend of an average of approximately 200 new applications per month and the likelihood that approximately 3,000 patients would renew, the department determined that by reducing the application fee to \$25 and the renewal fee to \$10 the program would generate revenue sufficient to operate the program while offsetting program costs. The department intends the rule amendment to be applied effective October 1, 2009.

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

III.

MAR 2009 Issue No. 15 (August 13, 2009), MAR Notice 37-482, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed amendment of three rules pertaining to Medicaid covered organ and tissue transplantation. A hearing was held September 3, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period ran until September 10, 2009. The proposed amendments are necessary to extend coverage of medically necessary organ and tissue transplantations to include all Medicare covered organ and tissue transplants to all Medicaid recipients. Prior to these proposed amendments, medically necessary transplants were covered services for Medicaid-eligible children through age 20 and were limited to bone marrow, kidney, cornea, and lymphocyte immune globulin for adults. The department is also proposing a methodology, based on standards promulgated by the U.S. Dept. of Health and Human Services, for determining whether a transplant procedure or drug is experimental or investigational and therefore not covered by Medicaid. The total projected budget increase for the transplantation services proposed in these amendments for FY 2010 is \$5,369,536 (state share=\$1,722,101, federal share=\$3,647,526) and for FY 2011 the total increase is projected at \$5,691,708 (state share=\$1,837,853, federal share=\$3,853,855). The department intends to apply these rules retroactively to October 4, 2008.

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

IV.

MAR 2009 Issue No. 15 (August 13, 2009), MAR Notice 37-481, NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed adoption of one new rule and the amendment of four rules pertaining to case management services for adults with severe disabling

mental illness. A hearing was held September 2, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period ran until September 10, 2009. The department is continuing its reorganization of the rules pertaining to mental health services, splitting the rules for youth and adults into separate chapters. In these rule proposals, the department is proposing a cross reference to the term "medically necessary service" to clarify the services are reimbursable under Montana Medicaid; an expansion of the term "severe disabling mental illness" to include individuals who have demonstrated suicidal behavior or an intent to commit suicide as well as those with diagnosed post traumatic stress disorder (or PTSD); a redefinition of case management service coverage and requirements to conform to federal law; and reorganization of certain reimbursement requirements for case management services to adults with SDMI. ARM 37.86.3506 is being amended to include assurances that individuals receiving case management services are allowed the free choice of any qualified Medicaid provider and to specifically remind providers that case management services will not duplicate payments made to public agencies or private entities under the Medicaid program. The department is proposing to amend ARM 37.86.3515 to include a more detailed explanation of the 15-minute billing increment for case management services provider reimbursement. In addition, providers of services would be allowed to bill for services to individuals transitioning from an institution to a community setting for the last 60 days. These services must be coordinated with and not duplicative of institutional planning discharge. The department intends to apply the rules retroactively to July 1, 2009.

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

V.

MAR 2009 Issue No. 14 (July 30, 2009), MAR Notice 37-480, NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT, AND REPEAL -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed adoption of seven new rules, the amendment of 23 rules, and the repeal of one rule pertaining to implementing the Healthy Montana Kids Plan Act. A hearing was held August 20, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period ran until August 27, 2009. The department is proposing these amendments to implement the changes in Montana CHIP and Medicaid that resulted from the passage of Initiative 155 (Healthy Montana Kids Plan Act) in November 2008 and was implemented in HB 2 of the 2009 Legislature and the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). Both acts require significant changes in the programs that will be implemented in phases. Essentially, the Healthy Montana Kids Plan Act, codified at Title 53, chapter 4, part 11, MCA, expands eligibility of kids 18 or younger for CHIP and Medicaid. As of October 1, 2009 the department intends to have the following HMK Plan Act requirements implemented: create an administrative single point of access for the HMK Plan within the department; transition current CHIP and Medicaid enrollees to the HMK Plan on October 1, 2009; increase the income limit for the HMK coverage group from 175% to 250% of the federal poverty level; increase the income limit for HMK Plus from 100% to 133% of federal poverty level; eliminate the Medicaid resource limits for children; change the time period a child must be without creditable insurance coverage from one month to three months; change the application processing time from 30 working days to 45 calendar days;

provide a new combined application for HMK and HMK Plus; expand access to the HMK Plan through enrollment partners; and implement outreach efforts. At a later date the department will adopt rules to implement provisions applicable to section 125 plans, premium assistance, and presumptive eligibility.

RULE I - Process for Identifying and Approving Enrollment Partners

Licensed health care providers, school districts, community-based organizations, and government agencies are qualified to be enrollment partners and the department will welcome requests from other entities. The list will be published on the department's website.

RULE II - Active Enrollment Process

The department will promote the HMK Plan through a combination of traditional marketing methods and social marketing. The department will maintain an enrollment partner network to actively enroll children in the plan. An individual may apply for the HMK or HMK Plus at any time and, if qualified, will be enrolled in the appropriate program.

RULE III - Movement Between HMK and HMK Plus

HMK-formerly CHIP; HMK Plus-formerly Montana Medicaid. The HMK Plan Act directs the department to promote seamless movement between the two coverage groups. The two coverage groups do have statutory differences. Different income thresholds apply, the HMK coverage group may have a waiting list but HMK Plus coverage may not, HMK Plus has more extensive coverage and there are different provider rates of reimbursement for each coverage group. Both coverage groups will be determined on a 12-month basis. An enrollee in the HMK coverage group will have the option of applying for HMK Plus coverage.

RULE IV - Point of Access

The department will accept and determine eligibility for all applications for children's health coverage provided by the HMK Plan.

RULE V - Transition

On October 1, 2009, all children currently enrolled in the CHIP and the Medicaid children's program will transition from CHIP and Medicaid to the HMK Plan. The second transition will take place when current CHIP enrollees from families with income between 100% and 133% of the federal poverty level transition to the CHIP funded Medicaid expansion, HMK Plus, at reapplication time from October 1, 2009 to September 30, 2010.

RULE VI - Prospective Payment System for Federally Qualified Health Center (FQHC) Reimbursement

CHIPRA requires states with separate or combined CHIP programs to pay federally qualified health centers and rural health centers using the Medicaid Outpatient prospective payment system. A rate for the HMK coverage group is being developed by the department.

RULE VII - Outreach Efforts

The department will promote the HMK Plan through a combination of traditional marketing methods, social marketing, and collaborative efforts with schools, advocacy groups, health care providers, etc. The department has gotten five new Vista volunteers and two new offices in Billings and Missoula.

The 23 amendments are to ARM Title 37, chapter 79 of the Administrative Rules of Montana housing the rules for CHIP and Medicaid. Throughout the rules, HMK and HMK Plus were

substituted for "CHIP" and "Medicaid."

The department estimates that 29,978 additional enrollees will be eligible for HMK and 10,000 current CHIP enrollees who were not eligible for Medicaid will become eligible for the CHIP-funded/Medicaid Expansion program HMK Plus.

TECHNICAL NOTE: Committee staff attended the hearing on August 20. Approximately eight other people attended the hearing including Rep. Chuck Hunter (who carried an HMK-related bill, HB 157, in 2009). Rep. Hunter submitted several comments to the proposed rules including the need for some clarification regarding the meaning of "active enrollment." John Morrison, former state auditor, who spearheaded the passage of I-155 in 2008 also submitted written comments which must be addressed by the department in their rule adoption notice.

VI.

MAR 2009 Issue No. 14 (July 30, 2009), MAR Notice 37-479, NOTICE OF PUBLIC HEARING ON AMENDMENT -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed amendment of five rules pertaining to the Montana Telecommunications Access Program (MTAP). A hearing was held August 19, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period ran until August 27, 2009. The Montana Telecommunications Access Program (MTAP) provides specialized telecommunications equipment to low income persons who need such equipment to communicate effectively using a telecommunications system. Persons whose gross family income is less than 250% of the poverty guidelines established by the U.S. Dept. of Health and Human Services are eligible for MTAP services. These rule proposals are the result of legislation enacted in 2007 making changes to MTAP's governing statute, 53-19-311, MCA. The most significant change was the amendment of 53-19-311, MCA (which provides funding for MTAP by providing for an assessment of ten cents per month) to make its language consistent with the newer telecommunications technologies. It was amended to provide that ten cents per month must be assessed by the service provider (rather than the local exchange company) against each end user connection (rather than against each telephone access line). Further changes to 53-19-311, MCA, clarify that the assessment applies to prepaid wireless services as well as to wireless services that are billed monthly. These rule proposals reflect the statutory changes to 53-19-311, MCA.

TECHNICAL NOTE: As required by 2-4-302, MCA, the sponsor of the enacting legislation (HB 611, 2007) for these rule amendments (Rep. Hal Jacobson) was notified and asked for his input regarding the amendments. The proposed rules were reviewed by committee staff and no technical problems were noted.

VII.

MAR 2009 Issue No. 12 (June 25, 2009), MAR Notice 37-478, NOTICE OF PUBLIC HEARING ON AMENDMENT -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed amendment of one rule pertaining to grandparents and relative caregivers access to birth records. A hearing was held July 16, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period ran until July 23, 2009. The proposed

amendments to ARM 37.8.126 allow relative caretakers, including grandparents, to have access to the birth certificate of that child provided certain identification requirements are met. Currently, relative caregivers can consent to a child's medical treatment under 40-6-501 and 502, MCA, and enrollment in school pursuant to 20-50-503, MCA, without having legal custody or the parents' permission. The caregivers may need copies of the child's birth certificate to further assist in getting medical treatment, education, public assistance, immigration, and for other matters during the time they care for the child. It was decided to use the department's rulemaking authority provided in 50-15-121, MCA, to add grandparents and relative caretakers as persons authorized to receive a certified copy of a birth record.

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

Notices of Adopted Rules:

VIII.

MAR 2009 Issue No. 15 (August 13, 2009), MAR Notice 37-477, NOTICE OF AMENDMENT AND REPEAL -- a public hearing was held July 16, 2009 with regard to the proposed amendment of two rules and the repeal of one rule pertaining to implementation of the Montana Clean Indoor Air Act. Seven comments were received. Rep. Tim Dowell, the sponsor of the enacting legislation (HB 643, 2005) was notified and provided comment. Enacted by the Montana Legislature in 2005, the Montana Clean Indoor Air Act (CIAA) required enclosed public places and workplaces to be smoke free but allowed bars and casinos to be exempted until October 1, 2009. As of October 1, 2009, all public places, including bars and casinos, must be smoke free. ARM 37.113.108 allows the department, a local health board, or their respective designees to conduct inspections of public facilities to ensure compliance with the provisions of CIAA. ARM 37.113.112 addresses the complaint policy regarding smoking violations and provides that an individual who believes that a violation of CIAA has occurred may file a written or electronic complaint with the department, local health board, or designee that describes the violation, provides the date of the violation, and is signed by the complaining party. OF NOTE: CFHHS may wish to authorize the drafting of a clean-up bill which would delete correspondingly unneeded sections of Title 50, ch. 40, part 1, the Montana Clean Indoor Air Act. For example: 50-40-104(4), MCA, states "The proprietor or manager of a business licensed under 23-5-611(1)(a) or (1)(c) may not allow any member of the public who is under 18 years of age to be present in any area of the establishment in which smoking is permitted." Since smoking is no longer permitted in any establishment come October 1, 2009, this language should be deleted from 50-40-104, MCA.

IX.

MAR 2009 Issue No. 15 (August 13, 2009), MAR Notice 37-476, NOTICE OF AMENDMENT -- a public hearing was held July 22, 2009 with regard to the proposed amendment of two rules pertaining to Medicaid nursing facility reimbursement. The proposed amendments implement legislative funding increases for nursing facility reimbursement for state fiscal year 2010. The department will pay Medicaid certified nursing care facilities that submit an approved request to the department a lump sum payment to their computed Medicaid payment rate to be used only for wage and benefit increases or lump sum payments for direct care or ancillary services

workers in nursing facilities. Funding through ARRA available July 1, 2009 included \$2,981,100 to provide a rate increase for nursing facility providers. Amendments to ARM 37.40.361 implement a one-time only funding of \$5,729,330 to allow for wage increases for nursing facility direct care workers. The rate increase for direct care and ancillary staff is limited to the 2010 through 2011 biennium only. The department applied these rules retroactively to July 1, 2009. Three comments were received regarding these rule proposals. In particular, Rose Hughes, Executive Director, Montana Health Care Association, commented on the importance of the department providing a rate increase in the statewide average reimbursement rate consistent with the legislature's intent in funding a 2% rate increase for Medicaid providers (rather than the 1.65% increase suggested in the proposed rule). The department determined the number of Medicaid bed days would be slightly lower than projected in the proposed rule and the patient contribution estimates would be slightly higher allowing for the full 2% increase.

X.

MAR 2009 Issue No. 16 (August 27, 2009), MAR Notice 37-475, NOTICE OF ADOPTION AND AMENDMENT -- a public hearing was held July 22, 2009 with regard to the proposed adoption of three new rules and the amendment of five rules pertaining to Medicaid mental health center services for adults with severe disabling mental illness. Seven comments were received. Some of the changes were necessary to reflect the transfer of mental health center services for youth with serious emotional disturbance to ARM Title 37, chapter 87, effective February 17, 2009. (Youth and adult mental health services have been administratively separated since 2003). New Rule I contains the substantive requirements for mental health centers for adults, Rule II sets out the requirements for program of assertive community treatments (PACT) teams, and Rule III establishes the service requirements for intensive community-based rehabilitation facilities. ARM 37.88.101 has been amended to include a provision that mental health centers can be reimbursed by Medicaid for an individual who has a primary substance use disorder with no qualifying severe disabling mental illness.

XI.

MAR 2009 Issue No. 15 (August 13, 2009), MAR Notice 37-474, NOTICE OF AMENDMENT -- a public hearing was held June 17, 2009 with regard to the proposed amendment of one rule pertaining to trailer courts and tourist campgrounds. Five comments were received. The department changed the term "trailer" in ARM 37.111.230(1) to "dependent recreational vehicle." The adopted rule eliminates the need for general service campgrounds to provide a general service building for independent recreational vehicle sites as, by definition, independent recreational vehicles have a toilet, sink, bathing facility, and a waste holding tank. A campground must still have a central services building within a 300 foot radius from all spaces designated for use by dependent recreational vehicles or tents. The department agreed with one commentor who stated that the entire rules section regarding trailer courts and campgrounds needs to be revised. The department agreed and stated that they will be pursuing a full revision as soon as possible.

XII.

MAR 2009 Issue No. 12 (June 25, 2009), MAR Notice 37-470, NOTICE OF AMENDMENT --

a hearing was held June 3, 2009 with regard to the proposed amendment of seven rules pertaining to Temporary Assistance for Needy Families (TANF). No comments or testimony were received. The department adopted several of these amendments to comply with definitions in the federal TANF Reauthorization law. ARM 37.78.206 was updated to reflect changes in the TANF policy requiring individuals who are applying for TANF cash assistance, who have been sanctioned twice, to complete an intensive case management (ICM) within the first 30 days of application. Failure to complete the ICM results in denial of the application. ARM 37.78.220 has been updated to reflect federal policy that the five-year ban on TANF use for qualified aliens entering the U.S. does apply to American Indians with at least 50% American Indian blood who were born in Canada and ARM 37.78.401 has been updated to clarify existing policy that the senior benefit payments that are received by the Crow elders are excluded as a resource per P.L. 103-444, Crow Boundary Settlement Act of 1994. The rules became effective July 1, 2009.

XIII.

MAR 2009 Issue No. 12 (June 25, 2009), MAR Notice 37-469, NOTICE OF AMENDMENT -- no public hearing was held with regard to one proposed rule amendment pertaining to components of quality assessment activities. No comments or testimony were received. ARM 37.108.501 et. seq. were adopted in 2001 to establish mechanisms for the department to evaluate quality assurance activities of health carriers providing managed care plans in Montana. ARM 37.108.507 requires health carriers to report their quality assessment activities to the department using healthcare effectiveness data and information set (HEDIS) measures, nationally utilized measures updated annually. Since the HEDIS standards change somewhat every year, the rule is updated annually to reflect the current year's measures and ensure that national comparisons are possible, since the other states will be using the same updated measures. The rule amendment was applied retroactively to January 1, 2009.

XIV.

MAR 2009 Issue No. 12 (June 25, 2009), MAR Notice 37-468, NOTICE OF AMENDMENT -- a public hearing was held May 28, 2009 with regard to the proposed amendment of four rules pertaining to Medicaid dental service providers' reimbursement rates. One rule amendment states Montana Medicaid's methodology for calculating the dental conversion. One comment was received with regard to this proposed rule change, from the Health Resources Division of DPHHS, which commented that the proposed conversion factor of \$31.77 should be revised to \$32.75, which was chosen by the department as the adopted rate. These rule amendments give notice of Montana Medicaid's dental reimbursement rate for state fiscal year 2010, which is based on the state fiscal year 2010 and 2011 appropriations for dental services by the 61st Legislature (in HB2, \$64,348-state general fund; \$208,659 federal match). The rule amendments were effective July 1, 2009.