



## Children, Families, Health, and Human Services Interim Committee

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### 66th Montana Legislature

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FONG HOM, Secretary

August 17, 2020

TO: Children, Families, Health, and Human Services Interim Committee  
FROM: Alexis Sandru, Staff Attorney  
RE: Administrative Rule Report for August 2020 Meeting

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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 (Department) for compliance with the Montana Administrative Procedure Act. At its June 2019 meeting, the Committee elected to receive bimonthly emails from staff that summarize Department 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 2020 meeting, covering Montana Administrative Register issues 12 through 15.

### PROPOSAL NOTICES

#### **MAR Notice Number:** 37-923

Subject: Prohibition on flavored electronic smoking devices

Summary: The Department is proposing three new rules that would prohibit a person from selling, offering for sale, giving, marketing, advertising, or otherwise distributing to a person within Montana a flavored electronic smoking device. The rules also prohibit transporting within Montana flavored electronic smoking devices intended for sale or distribution in the state. The Department notes it is exercising its authority under 50-1-202, MCA, to adopt and enforce rules regarding conditions of public health importance and that the rules are being proposed in response to the epidemic of youth e-cigarette or electronic smoking device use. The Department further notes that the "proposed rules are designed to remove a primary pathway to youth initiation of e-cigarette use by preventing the sale of flavored e-cigarettes in Montana to reduce the number of youth who use e-cigarettes and their exposure to the harms inherent with the use of such products".

The Department has concluded that the rules will significantly and directly impact small businesses who sell flavored e-cigarettes. The Department does not anticipate a significant fiscal impact on the Department. The Department intends for the rules to go into effect on the date of adoption.

Notes/Hearing: A public hearing was held on July 16, 2020. Public comment was due on July 24, 2020. **\*\*Note:** Although the terminology has changed somewhat, the proposed rules substantively mirror the emergency rules adopted by the Department in the fall of 2019 in MAR Notice Number 37-901, which prohibited flavored vapor products. As CFHHS recalls, the

emergency rules were supposed to go into effect on October 22, 2019; however, a lawsuit ensued challenging the existence of imminent peril to the public health, safety, or welfare, and the Twenty-First Judicial District Court issued a temporary restraining order, which prevented the rules from going into effect as scheduled. Following a hearing, the District Court found that the petitioners had not sustained a claim for a preliminary injunction and dissolved the temporary restraining order, allowing the emergency rules to go into effect on December 18, 2019. The emergency rules expired in April 2020 because, under the Montana Administrative Procedure Act, an emergency rule "may be effective for a period not longer than 120 days". (2-4-303, MCA.) \*\*Note: Legislative poll triggered under 2-4-403(2), MCA, on July 27, 2020 -- notified Department of pending poll.

**MAR Notice Number:** 37-925

Subject: Medicaid rates and services

Summary: The Department is proposing to:

- effective October 1, adopt a new version of the APR-DRG grouper, which contains changes to DRG relative weights and average length of stays;
- effective July 1, increase the bundled composite rate for dialysis clinics from \$250.88 to \$255.47;
- effective October 1, add transcranial magnetic stimulation services as a Medicaid service to "enhance the services provided to adults with severe and disabling mental illness who experience treatment-resistant major depression"; and
- effective October 1, amend the Addictive and Mental Disorders Division Medicaid Services Provider Manual for Substance Use Disorder and Adult Mental Health to:
  - amend terminology to avoid confusion regarding requirements for each of the Program for Assertive Community Treatment tiers;
  - clarify that Medicaid only pays for drug testing when determined medically necessary and that a court order does not signify medical necessity; and
  - require that Individualized Treatment Plans must be signed by the member.

The Department anticipates that the rulemaking will have a fiscal impact of \$261,810 in total funds in SFY 2021.

Notes/Hearing: A public hearing is scheduled at 10 a.m. on August 27, 2020, via remote conferencing (see the proposal notice for conferencing platform options). Public comment is due by 5 p.m. on September 4, 2020.

**MAR Notice Number:** 37-926

Subject: Graduate medical education methodology changes

Summary: The Department is proposing to revise the graduate medical education (GME) supplemental payment allocation to eligible hospitals. The Department notes that because of the growth in the number of participating hospitals, there is new variability among the hospitals participating, which has resulted in an extreme variation in the amount per resident that each hospital receives. The Department is proposing to revise the distribution allocation of the GME

supplemental payment to align the distribution of the GME Medicaid funding with the costs incurred and the number of residents trained at each hospital.

The Department anticipates no fiscal impact and intends for the rulemaking to apply retroactively to August 1, 2020.

Notes/Hearing: A public hearing is scheduled at 11 a.m. on August 27, 2020, via remote conferencing (see the proposal notice for conferencing platform options). Public comment is due by 5 p.m. on September 4, 2020.

**MAR Notice Number:** 37-928

Subject: Home and community-based services -- Big Sky Waiver Program

Summary: The Department is proposing to:

- adopt a new rule that would incorporate by reference the Big Sky Waiver Program Policy Manual. The Department notes that the Manual is an existing document that supplements requirements of the Big Sky Waiver Program, and the Department is proposing the incorporation by reference of the Manual in administrative rule in response to stakeholder feedback requesting that substantive program requirements be included in the rulemaking process. The Department is also proposing to amend the Manual to remove references to outdated sections and to update language to align with current law.
- revise the notice and fair hearing process that applies when the Department determines a member is ineligible for Big Sky Waiver services to increase the notice period from 10 working days to 30 calendar days before the Department may terminate services.

The Department anticipates no fiscal impact and intends for the rulemaking to go into effect October 1, 2020.

Notes/Hearing: A public hearing is scheduled at 1 p.m. on August 27, 2020, via remote conferencing (see the proposal notice for conferencing platform options). Public comment is due by 5 p.m. on September 4, 2020. \*\*Authorizing statute for New Rule I contains a citation to 53-6-141, MCA, which has been repealed -- emailed agency rule reviewer.

## **ADOPTION NOTICES**

**MAR Notice Number:** 37-908

Subject: Child welfare prevention and support services contract enrollment and participation

Summary: The Department has shifted from utilizing a request for proposal process to and open enrollment contracting with child welfare prevention and support service providers. The Department proposed four new rules that:

- clarify services provided and describe provider participation requirements;
- describe the requirements for enrolling as a provider;
- describe billing and reimbursement for services provided; and
- require provider education in instances where a provider has been sanctioned.

The Department did not anticipate a fiscal impact and intended to apply the rulemaking retroactively to July 1, 2019.

Notes/Hearing: A public hearing was not scheduled. Public comment was due on July 24, 2020.  
Adoption Notice Notes: The Department received no public comment and adopted the rules as proposed. The rulemaking applies retroactively to July 1, 2019.

**MAR Notice Number:** 37-916

Subject: Medicaid and non-Medicaid provider rates, fee schedules, and effective dates

Summary: The Department proposed to:

- implement provider rate increases for most Medicaid and non-Medicaid providers, effective July 1, 2020. This included a legislatively appropriated provider rate increase for the Big Sky Waiver Program, which increased provider rates by 1.83% for Big Sky Waiver services but excluded transportation miles and assisted living facility residential habilitation services.
- adopt the most recent relative value unit component of the resource-based relative value scale model (RBRVS) and to adopt conversion factors for allied health services, mental health services, and anesthesia services that provided for an increase of 1.83%. In addition, the Department proposed to increase the optometric rate of reimbursement and autism state plan services reimbursement by 1.83%.
- revise the physician conversion factor, including applying the reduction associated with HB 669 (2019);
- adopt fee schedules that are effective July 1, 2020, and that incorporate the changes in the rulemaking;
- adopt the January 1, 2020, federal register reference for the RBRVS and Outpatient Prospective Payment System reimbursement methodologies; and
- increase the Outpatient Cost-to-Charge ratio from 37.5% to 48%.

The Department anticipated a fiscal impact, which was described in detail, per provider type, in the proposal notice.

Notes/Hearing: A public hearing was held on June 4, 2020. Public comment was due on June 12, 2020.

Adoption Notice Notes: The Department responded to eight comments, including air ambulance codes, dental codes, optometrist reimbursement rates, TCM rates for adults with SDMI or SUD, and reimbursement rates for behavioral health group homes and the PACT community maintenance program (CMP). The Department adopted the rulemaking as proposed, except for adding a code for extra-oral posterior radiographic image and revising service requirements for PACT CMP, which were suggested in public comment. The rulemaking is effective July 1, 2020.

**MAR Notice Number:** 37-917

Subject: Medicaid and non-Medicaid manual updates

Summary: The Department proposed to incorporate updated versions of the Addictive and Mental Disorders Division:

- Medicaid Services Provider Manual for Substance Use Disorder and Adult Mental Health, dated July 1, 2020; and
- Non-Medicaid Services Provider Manual for Substance Use Disorder, dated July 1, 2020.

Changes to the Medicaid services manual included:

- expanding the Program for Assertive Community Treatment (PACT) to a three-tier model to support transitions between Montana State Hospital, crisis services, and community-based mental health services;
- creating a new stand-alone community maintenance service;
- removing intensive community-based rehabilitation because the service has been moved to the 1915(c) Home and Community-Based Services, Severe and Disabling Mental Illness waiver program as a habilitation service;
- replacing Adult Group Home with Behavioral Health Group Home;
- differentiating between 24-hour inpatient crisis stabilization services and 23-hour, 59-minute outpatient crisis stabilization services provided under the Crisis Stabilization Program; and
- update utilization review information due to the implementation of a new Department-wide utilization review contractor.

Changes to the non-Medicaid services manual included:

- general housekeeping amendments; and
- removing substance use disorder special projects because the program is now managed through contract with providers that offer the service. The Department noted that the amendment will eliminate redundancy between the contract process and administrative rule.

The Department anticipated a fiscal impact of \$3,534,500 (SFY 21) and \$5,575,600 (SFY 22) related to the PACT redesign and amendment of Adult Group Home to Behavioral Health Group Home.

Notes/Hearing: A public hearing was held on June 5, 2020. Public comment was due on June 12, 2020.

*Adoption Notice Notes:* The Department responded to 32+ comments, which the Department organized into the following categories: (1) positive comments about the collaborative process that led to the rulemaking; (2) policy-related suggestions regarding the future of services and improved outcomes for Medicaid members with SDMI; (3) comments from one provider pertaining to behavioral health group homes; and (4) comments providing edits and clarifications. In response to public comment received, the Department made several changes/clarifications to policy language. The rulemaking is effective July 1, 2020.

**MAR Notice Number:** 37-918

Subject: Home and community-based services for adults with severe and disabling mental illness

Summary: The Department proposed to adopt 15 new rules and amend and repeal existing rules as part of its request submitted to CMS to renew the Montana Medicaid Severe and Disabling Mental Illness (SDMI) 1915(c) Home and Community-Based Waiver and the concurrent 1915(b)(4) SDMI Waiver. The Department proposed the following waiver changes:

- update the SDMI definition to reflect current terminology;
- increase the unduplicated members served by the waiver from 357/year to 600 members in year 1, 650 in year 2, and 750 in years 3 through 5;

- update the SDMI determination form to the SDMI, Home and Community Services Waiver, Evaluation and Level of Impairment Form;
- revise how a member is placed on the waitlist;
- establish a proposed reserve capacity for individuals discharging from the Montana State Hospital and the Montana Mental Health Nursing Care Center and individuals accessing Money Follows the Person;
- remove pre-vocational services and expand residential habilitation services;
- add additional oversight for incident management, including updating the definition of serious occurrences; and
- provide additional details regarding waiver administration, oversight, and operations.

The Department anticipated a fiscal impact of \$84,500 (SFY 21) and \$101,800 (SFY 22).

Notes/Hearing: A public hearing was held on June 5, 2020. Public comment was due on June 12, 2020.

*Adoption Notice Notes:* The Department received three comments pertaining to the payee service, licensure for social workers on waiver case management teams, and the program supervisor position for mental health group homes. The Department mostly proceeded with the rulemaking as proposed, except the Department removed payee services because CMS informed the Department that the payee service is not a reimbursable service through the waiver. The Department also removed the licensure requirement for social workers on case management teams.

**MAR Notice Number:** 37-919

Subject: Nursing facility reimbursement

Summary: The Department proposed to:

- update the nursing facility reimbursement methodology to use a flat rate cost-based system and a quality component payment based on the 5-star rating system by CMS. The Department noted that the change is necessary because the current methodology utilizes parts of the CMS Minimum Data Set requirements that will no longer be collected because of changes to CMS regulations. The flat rate for FY 21 was proposed to be \$208.06, which is the same rate as the former statewide average price.
- provide that newly constructed facilities will be reimbursed in the manner described above;
- include add-on payments for trach dependent residents, behavior related needs residents, wound care residents, bariatric care residents, and residents with traumatic brain injury; and
- reimburse for telemedicine/telehealth originating site fees if the services meet certain requirements.

The Department anticipated a fiscal impact of \$6 million in combined state and federal funds and intended to apply the rulemaking retroactively to July 1, 2020.

Notes/Hearing: A public hearing was held on June 18, 2020. Public comment was due on June 26, 2020.

*Adoption Notice Notes:* The Department responded to seven comments, which mainly expressed support for the rulemaking. One commenter requested clarification regarding the quality component allocation, and another commenter acknowledged that the add-on fee schedule will help but that the Medicaid reimbursement rate still does not cover the actual average cost of providing care to residents. The Department amended the rules as proposed and is applying the rulemaking retroactively to July 1, 2020.

**MAR Notice Number:** 37-920

Subject: Developmental disabilities program services manual updates

Summary: The Department proposed to adopt and incorporate by reference an updated version of the Montana Developmental Disabilities Program Services Manual, effective July 1, 2020, which would:

- implement a 1.83% average provider rate increase; and
- clarify billing codes or processes to minimize billing issues for numerous services.

The Department anticipated a fiscal impact associated with the provider rate increase of \$906,663 (general fund) and \$1,691,971 (federal funds) and intended to apply the rulemaking retroactively to July 1, 2020.

Notes/Hearing: A public hearing was held on July 16, 2020. Public comment was due on July 24, 2020.

*Adoption Notice Notes:* The Department received no public comment and amended the rule as proposed. The rulemaking is effective July 1, 2020.

**MAR Notice Number:** 37-921

Subject: Durable medical equipment order and record requirement update

Summary: The Department proposed to amend durable medical equipment, prosthetic/orthotics, and supplies order requirements to mirror Medicare standard written order requirements, which were revised in January 2020 to reduce supplier and provider burden by no longer requiring a detailed written order.

The Department did not anticipate a fiscal impact.

Notes/Hearing: A public hearing was held on July 16, 2020. Public comment was due on July 24, 2020.

*Adoption Notice Notes:* The Department received no public comment and amended the rule as proposed. The rulemaking is effective July 1, 2020.

**MAR Notice Number:** 37-922

Subject: Healthy Montana Kids (HMK) dental benefits

Summary: The Department proposed updates to the HMK dental procedure codes to mirror changes in the state employee plan, which HMK follows as a benchmark. The Department also proposed to incorporate by reference changes to the list of covered dental procedures, effective July 1, 2020.

The Department does not anticipate a fiscal impact.

Notes/Hearing: A public hearing was held on July 16, 2020. Public comment was due on July 24, 2020. \*\*Unable to locate updated list of covered dental procedures at link cited in the proposal notice -- emailed agency rule reviewer (addressed -- list was posted).

Adoption Notice Notes: The Department received no public comment and amended the rule as proposed. The rulemaking is effective July 1, 2020.

**MAR Notice Number:** 37-924

Subject: Adoption of temporary emergency rules -- limiting COVID-19 exposure in assisted living facilities

Adoption Notice Notes: On July 13, 2020, the Department adopted three emergency rules pertaining to limiting COVID-19 exposure in assisted living facilities. The new rules:

- establish definitions, including definitions of "staff" and "test", which the Department states is necessary to ensure operators of assisted living facilities understand that the rules apply to a broad array of staff, not just direct care employees, and that tests must meet particular sensitivity and specificity requirements;
- provide that an assisted living facility may only allow visitors if certain testing requirements are met; and
- provide that an assisted living facility may only allow visitors if the facility has developed and implemented screening and control protocol for staff, residents, and other persons entering the facility.

As required under MAPA, the Department has provided CFHHS with special notice (emailed separately) of its reasons for the rulemaking and its finding of imminent peril to the public health, safety, or welfare: the emergency rules are intended "to help mitigate risk related to the present resurgence of COVID-19 cases in the state that has disparately impacted vulnerable populations in assisted living facilities. As of the date of [the filing of the emergency rules], there have been 82 cases in residents and 61 cases in staff of these facilities. These cases have led to 16 deaths."

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