Children, Families, Health, and Human Services Interim Committee

66th Montana Legislature

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

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ALBERT OLSZEWSKI
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FONG HOM, Secretary

October 30, 2019

TO: Children, Families, Health, and Human Services Interim Committee
FROM: Alexis Sandru, Staff Attorney
RE: Administrative Rule Report for November 2019 Meeting

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) for compliance with the Montana Administrative Procedure Act. At its June 2019 meeting, the Committee elected to receive bimonthly emails 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 September 2019 meeting, covering Montana Administrative Register issues 18 through 20.

PROPOSAL NOTICES

MAR Notice Number: 37-890 (AMENDED – See notes section below)
Subject: Private alternative adolescent residential programs or outdoor programs (PAARP)
Summary: The Department is proposing to adopt 61 new rules pertaining to licensure procedures and requirements for PAARPs. The proposed new rules:

- establish licensing fees, which are the same as the fees established under the Board of Private Alternative Adolescent Residential and Outdoor Programs;
- establish requirements for written policies and procedures, admissions, and discharges;
- require the creation of individual case plans for each program participant, require the documentation of services provided, and provide for the confidentiality of information provided to the program;
- establish requirements for a safe and healthy living environment;
- establish standards of employment, including requiring that staff be at least 21 years of age and have a high school diploma or GED;
- establish staffing ratios and training requirements;
- describe appropriate use of time-out procedures and provide guidance on the application of crisis intervention and physical restraints; and
- require physicals for participants in outdoor programs and additional training and safeguards specific to providing a safe program in the outdoors.

The Department does not anticipate a fiscal impact and intends for the rulemaking to go into effect October 1, 2019.

Notes/Hearing: A public hearing was held on September 12, 2019. Public comment was due on September 20, 2019. **A fiscal impact estimate was not included in the proposal. Emailed agency rule reviewer. The Department published an amended proposal notice that includes a fiscal impact estimate. The Department anticipates that the expected cumulative total of licensing fees paid by the 17 affected facilities will be $92,555/year.

MAR Notice Number: 37-896
Subject: Vital records amendments
Summary: The Department is proposing to clarify when a court order is required to amend a vital record by specifying that a court order is not required in two instances: (1) when Department supervisory staff are amending a vital record to protect the integrity, accuracy, and validity of the record; and (2) when a medical certification for cause of death is being amended and there is no dispute as to the cause of death. The Department is also proposing to remove a reference to depositing money in a state special revenue account that no longer exists and is proposing to increase the fees charged for certain services to cover the actual cost of providing the services. The Department notes that fees have not been revised or increased since 2002.

The Department anticipates that the proposed fee increase will result in an additional annual revenue of $13,490 for the Office of Vital Statistics. The Department intends for the rulemaking to go into effect on January 1, 2020.
Notes/Hearing: A public hearing was held on October 11, 2019. Public comment was due on October 18, 2019.

MAR Notice Number: 37-898
Subject: Assisted living and nursing facility reimbursement
Summary: The Department is proposing to:

- increase the statewide price (average daily rate) for nursing facilities from $204.30 to $208.06, effective October 1, 2019; and
- increase the daily rate for assisted living facilities from $77.05 to $78.80, effective October 1, 2019.

For state fiscal year 2020, the Department anticipates that the proposed increases will result in a total funds (state, federal, and patient contribution) impact of $3.7 million for nursing facilities and a state and federal funds impact of $356,010 for assisted living facilities.
Notes/Hearing: A public hearing was held on October 24, 2019. Public comment is due on November 1, 2019.
Amendment Notes: The Department amended the statement of reasonable necessity to correct an error in the website address for the proposed reimbursement rates for nursing facilities and to include the website address for the Department's proposed Medicaid daily rate for assisted living facilities.

ADOPTION NOTICES

MAR Notice Number: 37-865
Subject: Limiting opioid supply for Medicaid members without cancer diagnosis

Summary: The Department proposed to restrict payment for opioid prescriptions for Medicaid members (who have not received a prescription for an opioid within the last 45 days and who do not have a cancer diagnosis) to quantities that are no greater than a 7-day supply, with each day's supply being restricted to no more than 50 morphine milligram equivalents (MME).

The Department anticipated no fiscal impact and intended for the rulemaking to go into effect October 1, 2019.

Notes/Hearing: A public hearing was held on August 15, 2019. Public comment was due on August 23, 2019. **Error in implementing statutes citation – emailed agency rule reviewer. Also, question re: how the proposed rule amendments will mesh with HB 86 (2019).

Adoption Notice Notes: The Department received several comments, mainly concerning how the proposed rulemaking would mesh with HB 86 (2019). The Department amended the proposed rule to more closely align with HB 86 by (1) amending the definition of opioid naïve to include a 90-day lookback, rather than a 45-day lookback; (2) including exceptions for Medicaid members who have cancer, chronic pain, or pain while in palliative care or who are receiving the prescription to treat opioid abuse or dependence, which matches statutory language; and (3) eliminating the 50 MME/day limit. The Department also corrected the erroneous citation in the implementing cites.

MAR Notice Number: 37-877 (AMENDED – See notes section below)

Subject: Adoption and amendment of rules pertaining to rural health clinics (RHCs) and federally qualified health centers (FQHCs)

Summary: The Department proposed to:

- implement an optional alternative payment methodology for RHCs and FQHCs, which would allow providers to submit 2 years of current cost reporting information to establish a per-visit rate that would be derived from current cost;
- adopt three new rules that establish a process for requesting a change in the prospective payment rate (PPS) due to a change in scope of service; and
- clarify what constitutes a reimbursable encounter at an RHC or FQHC, specifying, with exceptions, that the Medicaid program will pay for one encounter a day when multiple encounters relate to the same primary diagnosis.

The Department anticipated that the proposed changes will result in a total funds impact of $11,354,623 (FQHCs) and a total funds impact of $8,472,296 (RHCs).

Notes/Hearing: A public hearing was held on August 15, 2019, and the Department received public comment through August 23, 2019. The Department received public comment questioning what methodology will be used to determine whether an RHC's or FQHC's change in scope of service will result in an incremental change to the facility's PPS rate. The Department published an amended proposal notice addressing that comment by clarifying the definition of baseline PPS and specifying calculations to be used in determining the amount of an incremental change, if any, and the resulting new PPS rate. The Department extended the public comment period to 5 p.m. on September 27, 2019.

Adoption Notice Notes: The Department received several comments in support of the rulemaking and received comments concerning the timeframe for submitting a prospective change in scope application and concerning the use of changes in scope of project and qualifying

event definitions. The Department adopted and amended the rules as proposed and intends to apply the rulemaking retroactively to July 1, 2019.

MAR Notice Number: 37-887
Subject: Communicable disease control
Summary: The Department proposed to adopt one new rule and to amend existing rules concerning communicable disease control to remain current with nationally notifiable disease surveillance investigation and control recommendations. Proposed updates included:

- addressing public health threats linked to multi-drug resistant organisms;
- adding latent tuberculosis, arsenic poisoning, mercury poisoning, and cadmium poisoning as reportable diseases and conditions;
- clarifying investigation coordination and submission of biological materials processes; and
- clarifying the processes for reporting and following up on reported latent tuberculosis.

The Department anticipated no fiscal impact and intended for the rulemaking to go into effect January 1, 2020.
Notes/Hearing: A public hearing was held on September 12, 2019. Public comment was due on September 20, 2019.
Adoption Notice Notes: The Department received no public comment and adopted and amended the rules as proposed. The rulemaking is effective January 1, 2020.

MAR Notice Number: 37-888
Subject: Amendment to Medicaid rates, services, and benefit changes
Summary: The Department proposed to:

- adopt a new version of the APR-DRG fee schedule for inpatient hospitals, which would increase the adult policy adjustor and decrease the neonate policy adjustor. The Department also proposed to increase the base rate for long-term acute care hospitals.
- add zirconium porcelain ceramic crowns as a covered dental service for adults age 21 and over;
- amend the Addictive and Mental Disorders Division (AMDD) Substance Use Disorder Non-Medicaid Provider Fee Schedule to:
    - add non-Medicaid group peer support services for individuals 0-200% FPL;
    - add bundled rates for Medication Assisted Treatment (MAT) services for individuals 139-200% FPL; and
    - enable reporting on the delivery of individual peer support services to the co-occurring SUD and SDMI population;
- amend the AMDD Medicaid Mental Health Individuals 18 Years of Age and Older Fee Schedule to enable reporting on the delivery of individual peer support services to the co-occurring SUD and SDMI population and to add bundled rates for MAT services;
- amend the AMDD Medicaid Services Provider Manual for Substance Use Disorder and Adult Mental Health to:
    - align the MAT program with federal requirements and clinical standards; and
    - remove the continued stay review criteria for intensive community-based services.

The Department did not anticipate a fiscal impact and intended for the rulemaking to go into effect October 1, 2019.
Notes/Hearing: A public hearing was held on August 29, 2019. Public comment was due on September 6, 2019.
Adoption Notice Notes: The Department amended the rules as proposed. The amendments are effective October 1, 2019. The Department responded to 16 comments, mainly concerning expansion of the dental benefit to cover porcelain ceramic crowns, the provision of peer support services, and the provision of MAT services.

MAR Notice Number: 37-889
Subject: Adoption/repeal of Medical Marijuana Program testing laboratory rules
Summary: Senate Bill 265 and House Bill 598 (2019) directed the state laboratory to adopt rules pertaining to requirements for licensing and accrediting medical marijuana testing laboratories. The Department proposed to repeal existing rules pertaining to testing laboratories and replace those rules with eight new rules developed by the state laboratory that address:

- requirements for applying for and renewing licenses;
- the role and responsibilities of the scientific director and requirements for recordkeeping, security, personnel, and insurance and bonding;
- development and implementation of a quality assurance program;
- quality control and proficiency testing requirements;
- processes for failed test samples; and
- testing requirements for marijuana or marijuana-infused products, extracts, and concentrates.

The Department did not anticipate a fiscal impact and intended to apply the rulemaking retroactively to October 1, 2019.
Notes/Hearing: A public hearing was held on September 26, 2019. Public comment was due on October 4, 2019.
**Emailed agency rule reviewer re: (1) reference to landlord in proposed new rules (SB 265 replaced references to landlord with references to property owner) and (2) absence of rules pertaining to samples submitted by registered cardholders (section 50-46-311(6)(c), MCA, requires a testing laboratory to conduct tests of samples submitted by registered cardholders).
Adoption Notice Notes: The Department received 31+ comments concerning the rulemaking. The Department repealed the rules as proposed and adopted the rules with the following changes:

- changed reference to "landlord permission form" to "property owner permission form";
- clarified that a licensed testing laboratory may obtain samples of marijuana items from registered cardholders in addition to providers or other licensees;
- clarified that failed harvest lots or test batches that fail quality assurance testing may be remediated once, except that harvest lots or test batches that fail quality assurance testing for moisture analysis or residual solvent screening may be remediated twice;
- clarified the action limit for moisture testing;
- provided clarification regarding residual solvents by including solvent isomers and their Chemical Abstract Services Registry Numbers; and
- corrected other inconsistencies in the rulemaking.

The Department indicated that it will pursue rulemaking in the future to define the term "analytical batch," to repeal ARM 37.107.410 and 37.107.407, which are in direct conflict with New Rules VII and VIII, and to address mandatory heavy metals testing.

MAR Notice Number: 37-901
Subject: Adoption of emergency rules prohibiting the sale of flavored vapor products
Summary: Citing the epidemic of youth e-cigarette or vapor product use and the outbreak of lung injury and death associated with vaping, the Department has adopted four emergency rules that prohibit a person from selling, offering for sale, giving, or otherwise distributing flavored vapor products to persons within Montana. A person is also prohibited from transporting within Montana flavored vapor products intended for sale or distribution within Montana. A flavored vapor product is defined as a vapor product that has a taste or smell other than the taste or smell of tobacco or marijuana. The Department intends for the rules to go into effect October 22, 2019. Pursuant to 2-4-303, MCA, the rules may not be in effect for longer than 120 days.
Notes/Hearing: The Montana Smoke Free Association and three vapor products retailers (Petitioners) have filed suit against DPHHS, Director Hogan, and Governor Bullock. The Petitioners assert that the emergency rules are in violation of MAPA because imminent peril does not exist and that the "Respondents failed to consider and implement other less restrictive and onerous administrative acts." The Petitioners have asked the District Court to temporarily, preliminarily, and permanently block enforcement of the emergency rules. On October 18, 2019, the District Court Judge issued a temporary restraining order, which temporarily blocks implementation of the emergency rules. A hearing is set for October 30, 2019, to consider whether to continue to block implementation of the rules.

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