



Children, Families, Health, and Human Services Interim Committee

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66th Montana Legislature

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September 13, 2019

TO: Children, Families, Health, and Human Services Interim Committee
FROM: Alexis Sandru, Staff Attorney
RE: Administrative Rule Report for September 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 June 2019 meeting, covering Montana Administrative Register Issues 12 through 17.

PROPOSAL NOTICES

MAR Notice Number: 37-865

Subject: Limiting opioid supply for Medicaid members without cancer diagnosis

Summary: The Department is proposing 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.

The Department anticipates no fiscal impact and intends 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).

MAR Notice Number: 37-873

Subject: Healthy learning environments in Montana public schools

Summary: The Department is proposing to adopt four new rules and to amend existing rules concerning health and safety in schools. The Department notes that the rules have not been updated since 1986. The proposed new rules address indoor air quality, limit student exposure to the outdoors during period of unsafe air quality, and ensure that chemicals used during science,

art, and vocational programs are used safely. The Department is proposing numerous amendments to existing rules, including but not limited to:

- revising preconstruction review requirements to address items such as chemical storage areas, emergency eyewash stations, playground safety, and school air intakes and radon mitigation;
- requiring annual inspections of schools and clarifying inspection procedures and recordkeeping requirements;
- addressing storage and administration of medications and reasonable accommodations for breastfeeding;
- reporting requirements for communicable diseases;
- requiring testing for lead in all human consumption fixtures;
- providing additional requirements related to drying laundry; and
- requiring the development and implementation of integrated pest management plans to prevent the spread of bedbugs, lice, rodents, and other pests.

The Department does not anticipate a significant fiscal impact, except for the lead testing, which the Department anticipates could have a significant fiscal impact. (For a detailed analysis of the fiscal impact, based on school size, see the rule notice.)

Notes/Hearing: A public hearing was held on July 11, 2019. Public comment has been extended to 5 p.m. on September 16, 2019.

MAR Notice Number: 37-877

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

Summary: The Department is proposing 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 per day when multiple encounters relate to the same primary diagnosis.

The Department anticipates 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. Public comment was due on August 23, 2019.

MAR Notice Number: 37-887

Subject: Communicable disease control

Summary: The Department is proposing 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 include:

- addressing public health threats linked to multidrug-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 anticipates no fiscal impact and intends for the rulemaking to go into effect January 1, 2020.

Notes/Hearing: A public hearing was held on September 12, 2019. Public comment is due by 5 p.m. on September 20, 2019.

MAR Notice Number: 37-888

Subject: Amendment to Medicaid rates, services, and benefit changes

Summary: The Department is proposing 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 is also proposing 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 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 does not anticipate a fiscal impact and intends for the rulemaking to go into effective October 1, 2019.

Notes/Hearing: A public hearing was held on August 29, 2019. Public comment was due on September 6, 2019.

MAR Notice Number: 37-889

Subject: Adoption/repeal of Medical Marijuana Program testing laboratory rules

Summary: SB 265 and HB 598 (2019) directed the state laboratory to adopt rules pertaining to requirements for licensing and accrediting medical marijuana testing laboratories. The Department is proposing 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 recordkeeping, security, personnel, and insurance and bonding requirements;
- 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 does not anticipate a fiscal impact and intends to apply the rulemaking retroactively to October 1, 2019.

Notes/Hearing: A public hearing is scheduled on September 26, 2019. Public comment is due by 5 p.m. 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 (50-46-311(8)(c), MCA, requires a testing laboratory to conduct tests of samples submitted by registered cardholders).

MAR Notice Number: 37-890

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 is due by 5 p.m. on September 20, 2019. **A fiscal impact estimate was not included in the proposal. Emailed agency rule reviewer.

MAR Notice Number: 37-895

Subject: Temporary rules for Medical Marijuana Program

Summary: The Department is proposing to adopt three temporary rules pertaining to the Medical Marijuana Program, effective September 22, 2019, and expiring on October 1, 2019. The temporary rules:

- make contested case hearing procedures applicable to denials, modifications, suspensions, or revocations of existing registry identification cards, provider licenses, or endorsements;
- set forth procedures for license and endorsement suspension or revocation, including providing that new cardholders may not designate a licensee involved in a contested case proceeding as their provider and that no new registered premises may be licensed to a provider in a contested case proceeding; and
- set forth applicable hearing procedures for contesting card application denials or revocations.

In accordance with SB 265 (2019), the Department has also replaced references to “landlord” with references to “property owner”.

Notes/Hearing: The Department states that a standard rulemaking procedure will be undertaken prior to the expiration of the temporary rules.

ADOPTION NOTICES

MAR Notice Number: 37-878

Subject: Medicaid rates, services, and benefits changes

Summary: The Department proposed:

- to update the Addictive and Mental Disorders Division Medicaid Services Manual for Substance Use Disorder (SUD) and Adult Mental Health to include: (1) peer support services, which would be a new benefit for Medicaid members, (2) a new bundled rate reimbursement option for providers delivering intensive outpatient services, and (3) additional provider types to conduct SUD assessments and referrals;
- to replace the Chemical Dependency Provider Manual with the AMDD Non-Medicaid Services Provider Manual for SUD;
- to increase most Medicaid and non-Medicaid provider rates, effective July 1, 2019; and
- to update relative value units for the resource-based relative value scale, conversion factors, and fee schedules.

For a detailed description of the fiscal impact associated with this rulemaking, see the rule notice.

Notes/Hearing: A public hearing was held on June 13, 2019. Public comment was due on June 21, 2019.

Adoption Notice Notes: The Department responded to 32 comments (note: The Department received more than 32 comments, but some comments were consolidated into 1 response.). In addition to comments in support of the rulemaking, comments addressed the following areas of concern and/or sought clarification in the following areas:

- several commenters stated that the proposed Medicaid rates don't cover the cost of providing care and questioned the expenditure of state appropriations;
- a commenter suggested adding dental codes to the dental hygienist services fee schedule, which the Department agreed to do;

- a commenter suggested changing the reimbursement rate for compounded products. The Department indicated that it will study the issue with the Montana Pharmacy Association and compounding pharmacies to update if appropriate.
 - numerous commenters expressed concern regarding the reimbursement rate for peer support specialists is inadequate and the difficulty involving the Medicaid requirement for member information. Commenters also opposed the medical necessity criteria for peer support services and advocated for Medicaid reimbursement for groups led by certified behavioral health peer support specialists, which the Department stated will not be eligible for reimbursement at this time;
 - multiple commenters expressed concern with the targeted case management rate. In response, the Department increased the rate to \$13.32 per 15-minute unit;
 - numerous commenters expressed concern regarding changes to concurrent treatment of co-occurring diagnosis (NOTE, this is the issue reported in the Billings Gazette editorial). The Department revised the manual to eliminate the confusion and clarified which services can be billed as a bundle, what is included in the bundled rates, and, when applicable, which services may be billed in a bundle and billed separately.
 - several commenters had billing questions; and
 - a commenter asked if the Department tracks recidivism for SUD treatment facilities. The Department indicated that it intends to pilot a study for intensive outpatient and peer support services as a means for outcome measurement and monitoring.
- The Department will apply the rulemaking retroactively to July 1, 2019.

****In comments 9 and 10, the Department stated that the 2019 Legislature made peer support a *required* Medicaid service. Emailed agency rule reviewer regarding whether SB 30 (2019) provides that peer support is a permissive rather than mandatory service.**

Correction Notice Notes: The Department filed a corrected notice of adoption in which it removed language indicating that peer support is a required Medicaid service from responses #9 and #10.

MAR Notice Number: 37-880

Subject: Amendment to Montana Trauma System Plan 2019

Summary: The Department proposed to adopt an updated State Trauma Plan to reflect current trauma care and needs. The Department anticipated no fiscal impact.

Notes/Hearing: A public hearing was held on July 11, 2019. Public comment was due on July 19, 2019.

Adoption Notice Notes: The Department received no public comment and amended the rule as proposed. The amendment is effective August 9, 2019.

MAR Notice Number: 37-882

Subject: Nursing facility reimbursement rates

Summary: The Department proposed to update the average daily rate for nursing facilities to \$204.30 for state fiscal year (SFY) 2020, which is an increase from \$202.45 in SFY 2019. The Department anticipated that the total cost for the increase is approximately \$1.85 million of combined state funds, federal funds, and patient contributions. The Department intended for the

rulemaking to go into effect July 1, 2019.

Notes/Hearing: A public hearing was held on June 13, 2019. Public comment was due on June 21, 2019.

Adoption Notice Notes: The Department received numerous concerns expressing concern that the rate is inadequate and that the Department did not provide sufficient information to the public in formulating the rates. The Department amended the rule as proposed and intends to apply it retroactively to July 1, 2019.

MAR Notice Number: 37-883

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

Summary: The Department proposed to revise the maximum level of allowable income in order to be eligible for MTAP by replacing 2018 federal poverty guidelines with 2019 guidelines. The Department anticipated no fiscal impact and intended to apply the rulemaking retroactively to February 1, 2019.

Notes/Hearing: No public hearing was scheduled. Public comment was due on June 7, 2019.

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

MAR Notice Number: 37-885

Subject: Amendments to licensing requirements for youth care facilities

Summary: The Department proposed to:

- revise the definition of lead clinical staff to refer to licensure candidates to reflect changes made by the Board of Behavioral Health during the 2015 legislative session; and
- require all administrators, staff, volunteers, interns, and any adult working in a youth care facility to:
 - complete a fingerprint-based background check by the FBI;
 - complete a Department child protective services background check and, if applicable, a tribal protective services background check and criminal background check; and
 - complete a Montana Sexual and Violent Offender Registry check.

The Department anticipated that there will be a fiscal impact associated with the fingerprint-based background check and estimated that there will be an increased cost to providers of approximately \$18 per person completing the background check.

Notes/Hearing: A public hearing was held on August 15, 2019. Public comment was due on August 23, 2019.

Adoption Notice Notes: The Department received numerous comments, mainly concerning implementation of the background check requirements. The Department amended the rules as proposed. The amendments go into effect October 1, 2019.

MAR Notice Number: 37-886

Subject: Migrating billing to Medicaid Management Information System (MMIS)

Summary: The Department proposed to adopt an updated version of the Montana Developmental

Disabilities Program Services Manual, which pertains to reimbursement for home and community-based services for individuals with developmental disabilities, effective July 1, 2019. The manual updates included:

- increasing provider rates for certain services and changing some daily rates that were based on an hourly reimbursement to a daily tier-based reimbursement;
- migrating to MMIS for billing (which allows for billing on a more frequent basis than currently allowed), payments, and maintaining client demographic information; and
- changing the format of the manual to be compliant with the Americans with Disabilities Act.

The Department anticipated that the proposed amendments will cost approximately \$3,041,996 in federal funds and \$1,246,679 in state general fund.

Notes/Hearing: A public hearing was held on June 28, 2019. Public comment was due on July 5, 2019.

Adoption Notice Notes: The Department received several comments concerning the provider rate increase and allocation and projected spending. The Department acknowledged an error in the fiscal impact: the projected state funds expenditure is \$1,654,209, not \$1,246,679. The Department amended the rule as proposed. The changes were effective July 1, 2019.