



Children, Families, Health, and Human Services Interim Committee

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

67th Montana Legislature

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November 4, 2021

TO: Children, Families, Health, and Human Services Interim Committee
FROM: Alexis Sandru, Staff Attorney
RE: Administrative Rule Report for November 2021 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 (Department) for compliance with the Montana Administrative Procedure Act. At its June 2021 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 September 2021 meeting, covering Montana Administrative Register issues 17 through 20.

PROPOSAL NOTICES

MAR Notice Number: 37-949

Subject: Developmental Disabilities Program provider rates updates

Summary: The Department proposed to, effective July 1, 2021:

- give an approximate 1% provider rate increase to Medicaid-funded Developmental Disabilities Home and Community-Based Services waiver services and a \$0.24/hour payment for recruitment and retention of direct care workers for specified services; and
- give an approximate 1% rate increase to targeted case management services for individuals with developmental disabilities enrolled in the 1915(c) 0208 home and community-based comprehensive waiver or eligible individuals age 16 and over.

The Department anticipated the following fiscal impacts: \$1,354,154 (total funds – waiver provider rate increase); \$1,106,482 (total funds – direct care retention and recruitment increase); and \$38,944.80 (total funds – targeted case management increase).

Notes/Hearing: A public hearing was held on July 15, 2021. Written public comment was due by on July 23, 2021.

Amendment Notes: Citing feedback from CFHHS, the Department amended this rulemaking to propose:

- a 1.9% provider rate increase for the Medicaid funded developmental disabilities home and community-based waiver services and distribute an additional \$1,004,294 for recruitment and retention of direct care workers, which the Department notes results in a combined weighted average increase of 2.7%; and

- a 1.9% rate increase for targeted case management services for individuals with developmental disabilities enrolled in the 1915(c) 0208 home and community-based comprehensive waiver or eligible individuals age 16 and over.

The Department anticipates the following fiscal impacts: \$2,460,636 (total funds – waiver provider rate increase); \$1,004,294 (total funds – direct care retention and recruitment increase); and \$73,850 (total funds – targeted case management increase). A second public hearing was held on September 30, 2021. Written public comment was due on October 8, 2021.

MAR Notice Number: 37-957

Subject: Update Medicaid provider rates, fee schedules, and effective dates

Summary: Citing HB 2 (2021) reductions, the Department is proposing to:

- adopt a fee schedule for inpatient hospitals, dated October 1, 2021, which provides for an overall inpatient hospital reimbursement reduction of 1% in SFY 2022;
- adopt and incorporate by reference the APR-DRG Table of Weights and Thresholds, effective October 1, 2021, and to decrease base rates for general hospitals, centers of excellence, and long-term acute care hospitals;
- decrease the conversion factor for outpatient services from \$56.64 to \$55.89, which provide for an overall 1% provider rate reduction in SFY 2022. The Department notes that "while the HB 2 reduction does not specify Free Standing Birth Centers, the reimbursement rates for this provider will be reduced the equivalent of 1% during SFY 2022."
- update the fee schedule for prosthetic devices, durable medical equipment, and medical supplies to implement CMS quarterly updates for these services.

The Department anticipates the following fiscal impact and intends to apply the rulemaking retroactively to October 1, 2021:

Provider Type	SFY 2022 Budget Impact (Federal Funds)	SFY 2022 Budget Impact (State Funds)	SFY 2022 Budget Impact (Total Funds)	Active Provider Count
Durable Medical Equipment	\$0	\$0	\$0	501
Free Standing Birthing Centers	(\$253)	(\$100)	(\$353)	2
Hospitals – Inpatient	(\$747,587)	(\$714,186)	(\$1,461,773)	431
Hospitals – Outpatient	(\$912,807)	(\$238,121)	(\$1,150,928)	431

Notes/Hearing: A public hearing was held on October 28, 2021. Written public comment is due on November 5, 2021.

MAR Notice Number: 37-958

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

Summary: The Department is proposing to amend the criteria for qualifying for home and community-based waiver services for adults with SDMI to:

- require three levels of high-level impairment instead of the existing two levels; and
- revise the qualifying SDMI diagnosis list to conform with the approved SDMI home and community-based services waiver.

The Department anticipates no fiscal impact and intends to apply the rulemaking retroactively to October 9, 2021.

Notes/Hearing: A public hearing was held on September 30, 2021. Written public comment was due on October 8, 2021.

MAR Notice Number: 37-959

Subject: Child care licensing

Summary: The Department is proposing to adopt two new rules pertaining to child care licensing, which provide requirements for relative care exempt providers and, in accordance with federal requirements, provide for identifying and preventing shaken baby syndrome and abusive head trauma.

The Department is also proposing several amendments to existing administrative rules, including:

- revise definitions to expand the number of children for whom a day care center can provide care from 13 children to 16 children, realign definitions, and change the number of children for whom a family, friend, and neighbor license can provide care from two to four children;
- clarify family, friend, and neighbor licensure requirements, including requiring pediatric first aid instead of general first aid;
- remove references to the Quality Assurance Division because child care licensing is now part of the Early Childhood and Family Support Division;
- add a 30-day grace period for immunization requirements for children experiencing homelessness or who are in foster care;
- revise staff recordkeeping, teacher orientation training, staffing qualification requirements, and director responsibilities to reflect knowledge of pediatric first aid;
- per SB 142 (2021), clarify that a group day care home can provide care for 10 children; and
- revise the address at which safe sleep requirements may be located.

The Department does not anticipate a fiscal impact and intends to apply the rulemaking retroactively to October 1, 2021. The Department notes that the rulemaking may affect small businesses and that there may be a negative impact for child care centers participating in the Best Beginnings STARS to Quality Program who under the rulemaking will meet the criteria for a group day care home rather than a child care center.

Notes/Hearing: A public hearing was held on October 28, 2021. Written public comment is due on November 5, 2021. **Repealed statutes cited in auth/imp citations – emailed agency rule reviewer.

MAR Notice Number: 37-961

Subject: Adoption of new rules pertaining to public participation

Summary: The Department is proposing to adopt five new rules that set for procedures for public participation in agency decisions. The proposed new rules: (1) adopt the attorney general model rules for public participation; (2) outline the objectives for public participation; (3) provide guidance for determining what matters constitute matters of significant public interest; (4) provide methods for notice and means for public participation; and (5) direct the public to the public information officer or the Department's website.

Notes/Hearing: A public hearing was held on October 28, 2021. Written public comment is due on November 5, 2021.

MAR Notice Number: 37-965

Subject: Adoption of new rule pertaining to health emergency waiver

Summary: The Department is proposing to adopt a new rule which would incorporate the emergency rulemaking adopted in MAR notice numbers 37-955 (providing regulatory flexibilities for health care providers, health care facilities, and other entities) and 37-964 (waiving certain hospital swing-bed requirements). The Department notes that the flexibilities are necessary to comply with federal waivers and that the Department intends for the rulemaking to expire upon conclusion of the nationwide public health emergency, as declared by the secretary of the federal Health and Human Services, or at the conclusion of any phase-down of federal waivers, whichever is later. The Department intends to apply the rulemaking retroactively to October 30, 2021, and other than savings resulting from the enhanced FMAP does not anticipate a fiscal impact.

Notes/Hearing: A public hearing was held on October 28, 2021. Written public comment is due on November 5, 2021.

MAR Notice Number: 37-966

Subject: Update optometric provider rates

Summary: In response to CFHHS' informal objections to proposed provider rates for optometric services, the Department has published a separate proposal notice for optometric services. The Department notes that, pursuant to CFHHS' recommendations, on September 29, 2021, the Department met with members of the Montana Optometric Association and walked through the rate setting process. The Department is now proposing an optometric provider rate of reimbursement (PRR), which is a pricing factor, of 114.79% with an effective date of July 1, 2021. The Department notes that the PRR will result in a weighted average 1% rate increase for optometrists and opticians.

The Department anticipates the following fiscal impact:

Provider Type

	SFY 2022 Budget Impact (Federal Funds)	SFY 2022 Budget Impact (State Funds)	SFY 2022 Budget Impact (Total Funds)	Active Provider Count
Optician	\$911	\$288	\$1,199	29
Optometrist	\$49,869	\$15,849	\$65,718	237

Notes/Hearing: A public hearing is scheduled at 2 p.m. on November 12, 2021. Written public comment is on November 19, 2021.

ADOPTION NOTICES

MAR Notice Number: 37-944

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

Summary: The Department proposed to update fee schedules for non-Medicaid services within the Addictive and Mental Disorders Division and Developmental Services Division (mental health services plan provider reimbursement, the 72-hour presumptive eligibility for adult-crisis stabilization services, youth respite services, and substance use disorder services provider reimbursement). The Department also proposed the following changes for Montana Medicaid providers:

- adopt the January 1, 2021, federal register for the RBRVS reimbursement methodology, which adopts and incorporates recent changes made by the Centers for Medicare and Medicaid Services;
- revise conversion factors for allied health services, mental health services, and anesthesia services to provide for an overall provider rate increase of 1.0% and for physician services, pursuant to 53-6-125, MCA, increase the conversion factor by the consumer price index for medical care for the previous year, resulting in a 6% adjustment;
- decrease the maternity policy adjustor to 1.0 and adopt a new policy adjustor of .83 for evaluation and management codes. The Department noted that this change is "necessary to offset Medicare increases in RVUs and to maintain budget neutral expenditures for physicians. Physicians were excluded from the provider rate increase approved in HB 2 by the Montana Legislature."
- change the optometric services provider rate of reimbursement from 117.5% to 115.69%;
- adopt the January 1, 2021, federal register for outpatient prospective payment system reimbursement methodology;
- propose a statewide average cost-to-charge ratio of 41.06%;
- increase the bundled composite rate for outpatient maintenance dialysis clinics;
- revise numerous other fee schedules (see proposal notice for complete list of services) to incorporate provider rate increases;
- update dental reimbursement to include a provider rate increase and update dental procedure codes;
- set the minimum dispensing fee for pharmacies at \$6.06 and increase the maximum dispensing fee;
- increase the fee paid for each additional vaccine administered to \$15.50;
- revise the effective date for durable medical equipment;
- revise fee schedules for home and community-based services for elderly and physically disabled persons, home health services, home health services, personal assistance services, self-directed personal services, and community first choice services;
- revise fee schedules for mental health center services for adults, home and community-based services for adults with severe disabling mental illness, and substance use disorder services to incorporate a provider rate increase;

- revise Medicaid youth mental health services fee schedule to incorporate a provider rate increase; and
- revise the Medicaid behavioral health targeted case management fee schedule to incorporate a provider rate increase.

Amendment Notes: The Department amended a portion of the proposal notice pertaining to physician reimbursement to comply with 53-6-127, MCA, which requires that a policy adjustor may not be less than 1%. The initial rulemaking proposed a .83% policy adjustor for evaluation and management. The Department proposed to remove the evaluation and management policy adjustor and to keep the maternity policy adjustor at 1%. The Department noted that it must decrease the proposed provider rate of reimbursement for optometrists to ensure that optical services meets the provider rate increase appropriated by the Legislature.

Notes/Hearing: A public hearing was held on July 1, 2021. A second public hearing was held on July 15, 2021. Public comment was due on July 9, 2021, but was extended to July 23, 2021.

Adoption Notice Notes: In response to CFHHS' pending objection to the portion of the rulemaking pertaining to optometry services, the Department adopted the rulemaking as proposed in the amended proposal notice but excluded any changes to optometry services. The Department noted that it intends to meet with optometry providers to discuss reimbursement rates and will proceed with separate rulemaking to address the optometry reimbursement rate. The rulemaking is effective retroactively to July 1, 2021.

MAR Notice Number: 37-946

Subject: Youth care facility requirements

Summary: In order to implement requirements of the federal Family First Prevention Services Act, the Department proposed the following changes to youth care facility rules:

- update definitions, including expanding the definition of "family";
- require therapeutic group homes to be accredited by independent organizations;
- increase the emphasis on discharge planning and increase the involvement of family and placing agencies;
- require therapeutic group homes to maintain contact information on all known family and document outreach efforts in order to increase contact with youth and family;
- require recordkeeping regarding independent contractors;
- require provider training on the trauma informed treatment model prior to working with youth;
- provide for increased participation by the youth and family in the youth's case planning; and
- revise staffing requirements and clarify which staff can provide therapy and therapeutic interventions.

The Department did not anticipate a fiscal impact and intended for the rulemaking to go into effect July 24, 2021.

Notes/Hearing: A public hearing was held on July 1, 2021. Written public comment was due on July 9, 2021.

Adoption Notice Notes: The Department responded to 51+ comments and, in response to public comment, made numerous changes to the proposed amendments, including revisions to the definition of family, recordkeeping requirements, and therapy requirements.

MAR Notice Number: 37-948

Subject: Nursing facility reimbursement

Summary: The Department proposed to revise nursing facility reimbursement rates for state fiscal year 2022 to increase the flat rate component for Medicaid nursing facility reimbursement from \$208.06 to \$208.71, which the Department noted "equates to an increase of 0.03% from SFY 2021." The Department estimated that the total cost of the rate increase is \$414,206 and intended to apply the rulemaking retroactively to July 1, 2021.

Notes/Hearing: A public hearing was held on July 1, 2021. Written public comment was due on July 9, 2021.

Adoption Notice Notes: The Department corrected a clerical error in the statement of reasonable necessity, correcting the rate increase from .03% to .3%. The Department received public comment stating that the .3% increase was not adequate and received a comment in appreciation of COVID-19 supplemental payments. The Department adopted the rulemaking as proposed and intends to apply the rulemaking retroactively to July 1, 2021.

MAR Notice Number: 37-952

Subject: Licensed marriage and family therapists

Summary: The Department proposed to include licensed marriage and family therapists as billable health professionals for rural health clinics (RHCs) and federally qualified health centers (FQHCs), making marriage and family therapy available to Medicaid members who receive care at RHCs and FQHCs.

The Department anticipated a total funds impact for fiscal year 2022 of \$263,919 (FQHCs) and \$35,204 (RHCs) and intended to apply the rulemaking retroactively to April 1, 2021.

Notes/Hearing: A public hearing was held on August 26, 2021. Public comment was due on September 3, 2021.

Adoption Notice Notes: The Department received no public comment and amended the rulemaking as proposed. The rulemaking is effective retroactively to April 1, 2021.

MAR Notice Number: 37-953

Subject: Youth foster homes

Summary: The Department proposed to:

- remove license restriction as an option under negative licensing action rules, which would still allow for the denial or revocation of a license based on findings of a criminal background check. The Department noted that federal law does not allow for restricting foster care licenses with certain criminal history and instead requires that the license is not granted.
- adopt the reasonable and prudent parenting standing for foster parents in determining whether to allow a child in foster care to participate in extracurricular, enrichment,

cultural, and social activities (existing rules prohibit a foster child from participating in high risk activities, including but not limited to hunting, snowmobiling, four-wheeling, or rock climbing, unless the foster parents obtain the written consent of the social worker).

The Department anticipated no fiscal impact and intended to apply the rulemaking retroactively to May 1, 2021.

Notes/Hearing: A public hearing was held on August 12, 2021. Public comment was due on August 20, 2021.

Adoption Notice Notes: The Department received no public comment and amended the rulemaking as proposed. The rulemaking is effective retroactively to May 1, 2021.

MAR Notice Number: 37-956

Subject: School immunization requirements

Summary: The Department proposed the following amendments and repeal of school immunization rules to meet the requirements of HB 334 (2021):

- expand which health care providers may sign student medical exemptions (under former statute only physicians could sign medical exemptions);
- remove language mandating the use of department forms for medical exemptions;
- remove the requirement that religious exemptions be updated annually; and
- remove the requirement that schools report immunization status of pupils to the Department and local health authorities.

The Department also proposed to amend school immunization age requirements for the Tdap to more closely align with Advisory Committee on Immunization Practice recommendations. The Department anticipated no fiscal impact associated with the rulemaking.

Notes/Hearing: A public hearing was held on August 26, 2021. Public comment was due on September 3, 2021.

Adoption Notice Notes: The Department received public comment concerning: (1) the applicability of FERPA to the rulemaking, (2) the sharing of immunization information, and (3) the impact on Montana's Immunization Information System. The Department adopted the rulemaking as proposed.

MAR Notice Number: 37-960

Subject: School health-related mandates

Summary: On August 31, 2021, the Department adopted an emergency rule providing that: *(1) In order to provide for the health, well-being, rights, and educational needs of students, schools and school districts should consider, and be able to demonstrate consideration of, parental concerns when adopting a mask mandate, and should provide students and/or their parents or guardians, on their behalf, with the ability to opt-out of health-related mandates, to include wearing a mask or face covering, for reasons including:*

- (a) physical health;*
- (b) mental health;*
- (c) emotional health;*
- (d) psychosocial health;*

(e) developmental needs; or

(f) religious belief, moral conviction, or other fundamental right the impairment of which could negatively impact the physical, mental, emotional, or psychosocial health of students.

The Department stated the following rationale for the emergency rulemaking: "Certain Montana schools and school districts have adopted and, with the beginning of the school year, will be enforcing mask mandates on the basis of public health, without considering the negative implications that such measures could have on the physical, mental, emotional, or psychosocial health of some students. Promulgation of this emergency rule is necessary because no other administrative act can be taken to avert this imminent peril to the public health, safety, and well-being of Montana youth, who are now returning or beginning to return to the classroom for the new school year."

The Department further stated: "EMERGENCY RULE I is necessary to provide essential health, well-being, fundamental rights, and a safe and effective learning environment for Montana youth. Emergency Rule I protects Montana students returning to school who may experience adverse effects from mandatory mask wear by directing schools and school districts that they should consider, and be able to demonstrate consideration of, parental concerns when adopting a mask mandate, and should provide those students, or their parents or guardians, on their behalf, with the ability to opt-out of wearing a mask, as necessary."

Notes/Hearing: **Per 2-4-303, MCA, an emergency rule may remain in effect for no longer than 120 days.**

MAR Notice Number: 37-964

Subject: Emergency rule waiving swing bed requirements

Summary: Citing the increase in COVID-19 cases in the state and increasing hospitalizations and resulting challenges facing hospitals, the Department has adopted an emergency rule waiving existing swing bed administrative rules, which the Department describes as follows: "[B]efore transferring a Medicaid member to a swing bed, the swing bed hospital must determine that no appropriate nursing facility bed is available to the patient within a 25-mile radius of the hospital, and the hospital must maintain written documentation of inquiries made to nursing facilities about the unavailability of an appropriate bed. When a nursing facility bed within a 25-mile radius of the hospital becomes available, the administrative rules require that the hospital discharge the Medicaid patient to the appropriate nursing facility bed within 72 hours of the nursing facility bed becoming available."

Notes/Hearing: The emergency rule went into effect September 17, 2021, and may remain in effect for no longer than 120 days.