



Children, Families, Health, and Human Services Interim Committee

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61st Montana Legislature

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August 13, 2010

TO: CFHHS Interim Committee members

FROM: Lisa Mecklenberg Jackson, Staff Attorney

RE: Committee objection to DPHHS Rule Adoption 37-509 regarding Medicaid reimbursement rate for physicians

At the last CFHHS meeting on June 28, 2010, the committee directed me to draft a letter to the Department of Public Health and Human Services objecting to the department's administrative rule adoption (MAR Notice No. 37-509) pertaining to resource based relative value scale (RBRVS) for health professional's reimbursement of services under Medicaid [see July 9, 2010 letter attached]. As you may recall, the department declined to implement the 6% statutory increase for physician reimbursement rates set forth in section 53-6-125, MCA, relying on the governor's power under section 17-7-140, MCA, to reduce certain expenditures during a projected fund balance as well as the department's authority under section 53-6-113(3) to set Medicaid rates generally.

It is the opinion of Legislative Services that reliance by the department on the governor's authority under section 17-7-140, MCA, is incorrect based on the specific charge contained in section 53-6-125, MCA, and that the department's adoption of the rule conflicts with the Montana Administrative Procedure Act [MAPA] in that the department does not have statutory authority for this rule change. On July 23, 2010, the department responded to the committee's objection letter [see July 23, 2010 letter attached] by asking the committee to withdraw its objection to the rule adoption. The department continued to state it has the authority under section 53-6-113(3), MCA, to set Medicaid rates including the reimbursement rates for physicians based on appropriations made the Legislature. However, Legislative Services still believes the department is inaccurate in its conclusion. Section 53-6-125, MCA, states that for fiscal year 2011, the 2010 percentage of the conversion factor for physician Medicaid-covered services will be increased by a minimum of 6%. The words "subject to funds appropriated by the Legislature" do not appear anywhere in the text of this statute, so it is difficult to understand the department's reliance on this appropriation concept in choosing not to follow section 53-6-125, MCA. Further, in order for this argument to pass muster, the department would need to prove that its general rulemaking authority contained in section 53-6-113(3), MCA, trumps the specific mandated increases contained in section 53-6-125, MCA. Rules of statutory construction are clear that a specific provision of a statute prevails over a general rule. Section 1-2-102, MCA.

SO, WHAT'S NEXT? The committee must decide whether it wishes to withdraw its objection to the rule adoption or whether it wishes to move forward with this process. If the committee votes to withdraw its objection, the matter goes away. If the committee does not wish to withdraw its objection, the procedure for moving forward is contained in section 2-4-406(3), MCA:

(3) If the committee fails to withdraw or substantially modify its objection to a rule, it may vote to send

the objection to the secretary of state, who shall, upon receipt of the objection, publish the objection in the register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule, provided an agency response must also be published if requested by the agency. Costs of publication of the objection and the agency response must be paid by the committee.

I checked with the Secretary of State's Office and it costs \$50 per page to publish in the ARM (the register with the adoption notice in it was already published so there would be no costs there). I would estimate the committee letter would take up approximately 2 pages in the ARMs for a cost of \$100. If the department opted to have its response published as it is allowed to do under section 2-4-406(3), MCA, the committee must also pay for those pages; likely another 2 pages. Ultimately, the committee would pay approximately \$200 if it wished to pursue this course of action of publishing its objection to the department's rule adoption.

The purpose of publishing the committee's objection to the rule adoption is stated in section 2-4-406(4), MCA:

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable attorney fees against the agency.

What this means is that in the event the department is challenged for not complying with the conversion factor rate increase contained in section 53-6-125, MCA, physicians would probably have adequate grounds for a lawsuit and quite likely would prevail.

I should also point out that under section 2-4-412 (2) MCA, the committee could request that a joint resolution or bill be drafted to amend the department's rule.

(2) The legislature may also by joint resolution request or advise or by bill direct the adoption, amendment, or repeal of any rule. If a change in a rule or the adoption of an additional rule is advised, requested, or directed to be made, the legislature shall in the joint resolution or bill state the nature of the change or the additional rule to be made and its reasons for the change or addition. The agency shall, in the manner provided in the Montana Administrative Procedure Act, adopt a new rule in accordance with the legislative direction in a bill.

In this case, the amendment could raise the reimbursement rate contained in ARM 37.85.212 to the 6% statutorily required level provided for in section 53-6-125, MCA. Just something for the committee to consider.

The text of ARM 37.85.212 is attached, in case you are interested. I will be discussing this issue during the administrative rule portion of your next meeting Aug. 23-24. Please let me know if you have any questions before that time. Thank you!

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