



Children, Families, Health, and Human Services Interim Committee

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64th Montana Legislature

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November 6, 2015

To: Children, Families, Health, and Human Services Interim Committee
From: Alexis Sandru, Staff Attorney
Re: ARM Review -- Compilation of E-mail Summaries -- MAR Issues 18 through 20

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) and the entities attached to DPHHS for administrative purposes for compliance with the Montana Administrative Procedure Act (MAPA). At its June 2015 meeting, the Committee elected to receive biweekly e-mails from staff, which summarize DPHHS rule activity and any issues noted in rule review. This paper is a compilation of those summaries that were prepared since the Committee's September meeting.

The Department has proposed the following:

MAR Notice Number: 37-698

Subject: Low-Income Energy Assistance Program (LIEAP) amendments for 2014-2015 and 2015-2016 heating seasons

Summary: The Department is proposing multiple amendments to the Low-Income Energy Assistance Program (LIEAP), which is a federally funded program that provides assistance to low-income households in paying for home heating costs. While many of the amendments are "housekeeping amendments", some of the more substantive amendments include the following:

- change the benefit paid to residents of publicly subsidized housing from a single payment of \$50 for a period of 5 years to a "modified benefit", which is an amount equal to 5% of the amount of a regular LIEAP benefit or a payment of \$25, whichever is greater, each year for a 5-year period;
- no longer require photo identification in processing applications if the SSN is verified and accept a birth certificate as proof of identify for individuals under 18 whose SSN cannot be verified;
- change the last day to submit LIEAP benefit receipts to June 20 (ARM currently requires that receipts be submitted within 45 days of the end of heating season or by June 25 if the Department extended the heating season beyond April 30);
- require that a person must be 18 years of age or older in order to file an LIEAP application unless the person is an emancipated minor; and
- exclude out-of-pocket health insurance premiums from countable income when calculating a household's poverty level.

Notes/Hearing: A public hearing was held on November 4, 2015.

MAR Notice Number: 37-722

Subject: Child care assistance

Summary: The Department is proposing the following amendments to the Best Beginnings Program, which provides low-income parents and guardians with financial assistance for day care:

- amend the Montana Child Care Manual (revising terminology, adding definitions, revising provisions related to special needs children, revising work requirements, providing for 12-month eligibility and annual eligibility redetermination);
- clarify required documentation for presumptive eligibility; and
- provide that the Department will no longer recover overpayments that are made as a result of a Department error or omission.

Notes/Hearing: A public hearing was held on November 4, 2015. **There are ambiguities in the proposed amendments concerning overpayment recovery. I contacted the agency rule reviewer and have been reassured that the ambiguity will be resolved to reflect the Department's intent to not recover overpayments that are made due to Department error or omission.

MAR Notice Number: 37-724

Subject: Compliance with International Classification of Disease, Tenth Edition (ICD-10-CM)

Summary: The Department is proposing to amend rules pertaining to eligibility requirements and reimbursement procedures for adult Medicaid mental health services, including:

- implement ICD-10 requirements that are mandated by CMS; and
- incorporate a new definition of severe disabling mental illness using the ICD-10-CM diagnoses (eliminate medical and physical conditions such as amnesic disorder, disorders due to medical conditions, and pervasive developmental disorder; replace mood disorder diagnosis codes with depressive disorders; broaden schizophrenia, schizophrenia spectrum, and other psychotic disorders; and add borderline personality disorder and autism spectrum disorder).

The Department believes that while the ICD-10-CM and new diagnoses could increase the number of individuals determined to have a severe disabling mental illness, the potential increase in expenditures is not expected to be substantial.

Notes/Hearing: A public hearing was held on October 14, 2015. **Erroneous authority and implementation cites -- agency rule reviewer contacted.

MAR Notice Number: 37-725

Subject: Addition of lactation services to Medicaid outpatient hospital services

Summary: The Department is proposing to add lactation services to Medicaid outpatient hospital services. The Department defines lactation services as "support through breastfeeding education and consultations with certified lactation providers to increase the health of both mother and baby".

Notes/Hearing: A public hearing was held on November 4, 2015. **The statement of reasonable necessity was incomplete and erroneous citations were included as implementing statutes. The agency rule reviewer was contacted. I anticipate that the errors will be remedied in an amended proposal notice.

Amended Proposal Notice Notes: The Department is amending the statement of reasonable necessity to include reasons why the Department is adding lactation services as an outpatient hospital service, mainly because evidence indicates that lactation support will decrease health risks for children and mothers and provide savings in women's health care expenses and formula costs. The Department has also determined that the addition of lactation services is appropriate for performance-based measurements, as required under 53-6-196. The Department plans to measure the outcomes related to the addition of lactation services by:

- considering the number of Medicaid women who receive outpatient lactation services annually;
- considering the number of breast pump rentals for members annually;
- comparing 2016 breastfeeding rates to the 2014 Breastfeeding Report Card by the CDC; and
- comparing the 2015 and 2016 WIC and SNAP formula expenditures for any county in which lactation services are provided.

The public comment period has been extended to November 19, 2015.

MAR Notice Number: 37-726

Subject: Forensic mental health facility endorsement for licensed mental health centers

Summary: The Department is proposing to adopt 18 new rules that establish minimum standards for a licensed mental health center to operate a secure forensic mental health facility for adults who are:

- committed to a mental health facility for evaluation of fitness to proceed;
- committed to the custody of the Department for treatment to gain fitness to proceed;
- found not guilty of a crime by reason of mental illness and who are committed to the custody of the Department for custody, care, and treatment;
- ordered to undergo a mental health evaluation as part of a presentence investigation;
- found guilty of a crime but suffering from a mental illness and who are sentenced to the custody of the Department for care and treatment;
- transferred from the Department of Corrections; or
- committed to the MT State Hospital while serving a sentence at a correctional facility.

The Department noted the following purpose behind the proposed rules:

For some time, the department has sought to remedy the D Wing [serves forensic patients at the MSH] overcrowding through the legislative process. This effort has been unsuccessful. The need to expand the facilities available for forensic mental health services is great and growing. Therefore, the department has created a new endorsement under which a licensed mental health center can provide forensic mental health services to persons who do not need to be in a psychiatric hospital, but need to be in a secured setting. The requirements for the endorsement are intended to create a forensic mental health facility that will improve the current situation in D Wing and will address the facility issues with D Wing in terms of security, separation of residents, etc. The MSH D Wing will continue to house forensic residents.

Notes/Hearing: A public hearing was held on October 14, 2015.

MAR Notice Number: 37-727

Subject: Update of Physician-Related Services Provider Manual

Summary: The Department is proposing the following updates to the Medicaid Physician-Related Services Provider Manual:

- reorganize manual and improve style;
- clarify that persons who become retroactively eligible for Medicaid may be accepted by providers as Medicaid members from the current date or the date when retroactive eligibility was effective;
- clarify that Native Americans who have been treated at an IHS or tribal or urban facility are exempt from member cost sharing;
- clarify how to report anesthesia procedures and how to correctly bill for those services; and
- clarify billing dates for obstetrical services.

Notes/Hearing: A public hearing was held on November 4, 2015.

MAR Notice Number: 37-728

Subject: Effective dates of Medicaid provider fee schedules

Summary: The Department is proposing to update effective dates to January 1, 2016, for certain Medicaid provider fee schedules that use Medicare pricing for procedure codes, which Medicare updates in January of each year. The Department is proposing to add two new dental procedure codes for adults that were recommended by the Montana Dental Association and that are evidence-based in the prevention of dental caries. The Department also has determined that it is overpaying for incontinence supplies and is proposing to change to a set rate fee schedule that uses an average of the Idaho and Wyoming fee schedules. As required under 53-6-196, the Department has determined that the proposed dental procedure codes and method of payment for incontinence supplies can be measured by performance-based measures and will be measured by looking at expenditures in the year after adoption of the proposed changes and the year prior to the adoption of the proposed changes. The Department expects to see savings in the amount of funds paid for dental caries treatment and incontinence supplies.

Notes/Hearing: A public hearing is scheduled for November 19, 2015, at 10 a.m. in the auditorium of the DPHHS building.

MAR Notice Number: 37-729

Subject: Healthy Montana Kids/CHIP dental benefits and evidence of coverage

Summary: The Centers for Medicare and Medicaid Services (CMS) approved the Montana Medicaid state plan, requiring the HMK/CHIP program to adopt an operational benchmark for its HMK dental program, such as the State of Montana employee dental benefit plan. The Department is proposing to follow the employee dental benefit plan and is amending rules accordingly. The Department is also proposing to include folic acid as a covered over-the-counter medication on the basis that folic acid supplementation for expectant mothers prevents 69% of fetal neural tube defects and is already covered as a prescription drug.

Notes/Hearing: A public hearing is scheduled for November 18, 2015, at 2:30 p.m. in the auditorium of the DPHHS building.

MAR Notice Number: 37-730

Subject: New rules implementing the HELP Act

Summary: The Department is proposing the following 10 new rules to implement the HELP Act.

The rules include:

- a purpose section;
- a definitions section;
- a section setting forth who is eligible for coverage under the HELP Program;
- a benefits plan section, which provides that coverage for services is provided through a TPA benefits plan; sets forth exceptions to this requirement; adopts and incorporates by reference the HELP Program Evidence of Coverage (describing health benefits under the program); and exempts services that are not covered, not reimbursable, not medically necessary, experimental, unproven, or performed in an inappropriate setting;
- a section setting MAGI as the measure of income for participants;
- a section regarding premiums (similar to statutory language);
- a section on copayments, which caps the total amount of copayments made in a benefit year at 3% of the participant's annual income; provides services for which copayments may not be charged; exempts certain individuals from copayments; caps the total amount of premiums and copayments at 5% of the annual family household income; and provides that providers may not charge for exempted services unless the participant signs an advance benefit notice prior to receiving the service;
- a section on reimbursement, specifying which services are reimbursable directly through the TPA or the Department;
- a section setting forth requirements for providers who want to participate in the HELP Program; and
- a grievance and appeal section, which allows an applicant or participant in the HELP Program who is aggrieved by an eligibility or benefits decision to request a fair hearing.

The Department has determined that the proposed changes are appropriate for performance-based measurements and has formulated a matrix describing the measurements, which is available by viewing the proposal notice.

Notes/Hearing: These rules will not go into effect UNLESS the HELP Act goes into effect, which requires CMS approval of the state waiver request (waiver was approved November 2, 2015). A public hearing is scheduled for November 18, 2015, at 10 a.m. in the auditorium of the DPHHS building.

MAR Notice Number: 37-731

Subject: State reimbursement rate for health care services provided to individuals in the care or custody of the Department of Corrections or DPHHS

Summary: The Department is proposing rules that would implement a part of the HELP Act (now codified as 53-6-1312) that set the Medicaid rate as the amount that the state will pay for individuals who are in the custody of the Department of Corrections or who are residents, by commitment or otherwise, at the Montana State Hospital, the Montana Mental Health Nursing Care Center, the Montana Chemical Dependency Center, or the Montana Developmental Center.

The proposed rules:

- provide that the state will process these claims through the Department's Medicaid claims processing agent;
- require a provider to enroll in Medicaid and accept the Medicaid rate as reimbursement in full;
- set forth provider requirements generally applicable to Medicaid providers in order to establish a consistent method for coding and processing claims;
- provide an administrative review process for claims disputes; and
- do not impose cost-sharing requirements. The Department determined that the administrative costs of attempting to collect cost-sharing payments from individuals in the care or custody of the state outweigh any benefits of a cost-sharing program.

Notes/Hearing: These rules will not go into effect UNLESS the HELP Act goes into effect, which requires CMS approval of the state waiver request (waiver was approved November 2, 2015). A public hearing is scheduled for November 19, 2015, at 9 a.m. in the auditorium of the DPHHS building. **The purpose section of the proposed rules does not mirror statutory language. I contacted the agency rule reviewer and believe this discrepancy will be resolved.

MAR Notice Number: 37-732

Subject: Establishment of annual payment limit for dental services provided through Medicaid

Summary: In order to control dental costs, the Department is proposing to establish an annual limit of \$1,125/benefit year for restorative dental services, which include crowns and extractions. Diagnostic and preventative services will remain uncapped. The Department has determined that the proposed rulemaking is appropriate for performance-based measurement and, over a 12-month period, will track the number of members whose dental benefit is capped to determine the number of individuals who are adversely affected by the cap.

Notes/Hearing: A public hearing is scheduled for November 18, 2015, at 1:30 p.m. in the auditorium of the DPHHS building.

The Department has adopted the following (adoption notice notes in italics):

MAR Notice Number: 37-717

Subject: Adoption of new rules pertaining to production and sale of cottage food products

Summary: As a result of the passage of HB 478 (2015) (an act implementing safety standards and oversight for cottage food operations and various retail food establishments), the Department is proposing to adopt new rules to regulate the cottage food industry, including rules providing:

- which cottage food products are allowed;
- labeling requirements;
- requirements for cottage food operator health, personal cleanliness, and hygienic practices;
- requirements for how cottage food products are manufactured;
- registration requirements; and
- enforcement, inspection, and sampling requirements.

Notes/Hearing: A public hearing was held on August 20, 2015.

Amended Proposal Notice Notes: The Department amended the proposal notice to include licensing fees for retail food establishments. HB 478 removed statutory license fees and provided the Department with authority to provide for the license fees in rule. The proposed fees are the same as what is currently provided in statute (\$85 for operations with two or fewer employees and \$115 for operations with more than two employees). The public comment period was extended to September 4, 2015.

Adoption Notice Notes: The Department adopted most of the rules as proposed; however, the rules pertaining to approved cottage food products, manufacture of cottage food products, and registration requirements were adopted with changes in response to the 19+ comments the Department received. The changes are effective September 25, 2015.

MAR Notice Number: 37-718

Subject: Update of adult and children's mental health fee schedules

Summary: The Department is proposing the following:

- Medicaid youth mental health fee schedule -- amend billing code for extraordinary needs aide service from per diem to 15-minute unit to comply with federal regulation;
- Medicaid provider fee schedule -- clarify that psychological testing policy adjuster only applies to psychologists; and
- severe disabling mental illness home and community-based services waiver is discontinuing the supported living bundled service.

Notes/Hearing: A public hearing was held on August 19, 2015.

Adoption Notice Notes: The Department did not receive any public comment and amended the rules as proposed. The amendments will apply retroactively to October 1, 2015.

MAR Notice Number: 37-719

Subject: Revision of authorization requirements for Medicaid mental health services for youth

Summary: The Department is proposing to amend the following ARMs pertaining to Medicaid mental health services for youth:

- 37.87.102 -- housekeeping amendment involving definitions
- 37.87.901 -- correcting erroneous citation to ARM
- 37.87.903 -- amending the Children's Mental Health Bureau, Medicaid Services Provider Manual, dated October 1, 2015. The proposed amendments pertain to provider participation, utilization review, program requirements, and procedures the Department will use to pay Medicaid mental health services for youth and are the result of feedback received from providers and the Department's own review of its ARMs and its continued effort to incorporate regulations, policies, and procedures into the Manual.
- 37.87.1303 & 37.87.1313 -- removing obsolete references/housekeeping/updating language to take into account proposed amendments to the Manual/updating references to waiver manuals.

The Department is also proposing to repeal 37.87.723 (Mental health center services for youth with serious emotional disturbance -- provider requirements) on the basis that these requirements are already provided in licensure rules and are redundant.

Notes/Hearing: A public hearing was held on August 19, 2015. **Erroneous implementing

statutes found in rule review -- agency rule reviewer contacted to correct citations. Also, SB 336 requirements omitted.

Amended Proposal Notice Notes: The Department amended the proposal notice to comply with the requirements of SB 336 (now codified as 53-6-196). The Department determined that the principal reasons and rationale for the proposed rule cannot be assessed by performance-based measurements. The Department also amended the proposal notice to correct erroneous cites to implementing statutes. The public comment period was extended to September 4, 2015.

Adoption Notice Notes: The Department amended and repealed the rules as proposed, but did make multiple changes to the Children's Mental Health Bureau, Medicaid Services Provider Manual in response to the 30+ comments the Department received. The changes are effective October 1, 2015.

MAR Notice Number: 37-720

Subject: Revision of exceptions for Passport to Health Program referrals

Summary: The Department is proposing to amend the Passport to Health Program, a primary care case management program for Medicaid members, to allow members to receive inpatient professional services without having to receive referrals from their primary providers.

Notes/Hearing: A public hearing was held on September 2, 2015.

Adoption Notice Notes: The Department did not receive any public comment and amended the rule as proposed. The amendment will apply retroactively to September 1, 2015.

MAR Notice Number: 37-723

Subject: Short-term voluntary inpatient mental health treatment

Summary: The Department is proposing to adopt a new rule that would implement HB 35 (2015 -- by request of the 2013-2014 CFHHS Interim Committee), which appropriated \$1 million from the general fund for the biennium to be used to pay for short-term inpatient treatment (up to 14 days) and required the Department to adopt rules to pay for this treatment. The proposed new rule:

- provides that eligible providers are inpatient behavioral health units in hospital settings and mental health centers with inpatient crisis stabilization services;
- provides that eligible patients are those persons who have voluntarily agreed to short-term inpatient treatment (and who have been recommended by a professional person for the treatment) in lieu of a 3-month commitment to the Montana State Hospital; and
- establishes rates of \$875/day for an inpatient behavioral health unit and \$575/day for an inpatient crisis stabilization program.

Notes/Hearing: A public hearing was held on September 16, 2015.

Adoption Notice Notes: The Department received numerous comments and adopted the rule with the following changes in response to the comments:

- clarified that the all-inclusive rate for inpatient crisis stabilization does not include medical procedures but does include laboratory services and medications related to psychiatric care;
- extended payment for an additional 5 days, pending a commitment hearing as provided in 53-21-1205;

- clarified that the all-inclusive rate for hospital behavioral health unit does not include additional reimbursement for emergency medical expenses but does include minor medical procedures that do not require transfer of the person to another unit in the hospital; and
- clarified that providers will be notified of exhaustion of funds when 75% of the program funds have been authorized.

The Department intends to apply the rule retroactively to July 1, 2015.

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