



## Children, Families, Health, and Human Services Interim Committee

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### 61st Montana Legislature

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July 9, 2010

Ms. Anna Whiting Sorrell, Director  
Department of Public Health and Human Services  
111 North Sanders, Room 301  
Helena, MT 59620

Dear Director Whiting Sorrell:

Pursuant to the Children, Families, Health and Human Services Interim Committee's (CFHHS) statutory authority as the appropriate administrative rule review committee under 5-5-225, MCA, and the provisions of Title 2, chapter 4, parts 3 and 4, this letter constitutes notice to the Department of Public Health and Human Services that the members of the CFHHS Interim Committee have notified the committee's chair that they object to the adoption of rulemaking promulgated by MAR Notice 37-509 relating to resource based relative value scale (RBRVS) for physician reimbursement of services under Medicaid. Montana Medicaid uses the RBRVS rate system to calculate the fee Montana Medicaid pays to 20 types of health care professionals. The department annually proposes to amend ARM 37.85.212, in this case, via MAR Notice 37-509, to adopt current relative value units (RVUs). The fee paid for a procedure by a health plan is calculated by multiplying that procedure's RVU by the health plan's conversion factor. The conversion factor for licensed physicians is set by 53-6-124 through 53-6-127, MCA. Because of the general fund budget deficit, in MAR Notice 37-509, the department is proposing to set conversion factors and fees for Medicaid reimbursement for physicians for SFY 2011 at the SFY 2010 level.

Specifically, as discussed during the administrative rule review portion of their June 28, 2010 meeting, the CFHHS Interim Committee is objecting to the rule adoption notice for MAR Notice 37-509 for the following reason:

CFHHS disagrees with the department's authority to set the physician's reimbursement rate at SFY 2010 levels. In 2007, the Montana Legislature enacted 53-6-125, MCA, pertaining to physician's reimbursement rates and provides that for fiscal year 2011, the 2010 percentage of the conversion factor (and accordingly, physician rate increases) will be increased by a minimum of 6%. In the opinion of CFHHS, there is nothing in 17-7-140, MCA, giving the governor limited authority to reduce certain expenditures during a projected fund budget deficit, which explicitly or implicitly gives the executive branch the authority to change statutorily prescribed payments or duties. Such a practice would be seen as a violation of the separation of powers. Furthermore, the department's assertion that because physician provider rates are not listed in 17-7-140(2), MCA, as being exempt from a reduction in spending, it is therefore allowable to make cuts to those statutorily mandated rates doesn't hold merit either. Only six exemptions are listed in 17-7-140(2). Using the department's reasoning, hundreds of state statutes should be specifically exempted in order to be free from reductions by the executive branch.

Legal staff for the CFHHS Interim Committee had asked the department to respond to these concerns

precipitated by the proposal notice of MAR Notice 37-509 prior to adopting the rule. The department chose to respond in the rule adoption notice in which the department continued to state it had the authority to make the cuts to physician reimbursement rates under 17-7-140, MCA. Although the department has broad authority under 53-6-101(8) and 53-6-113 (3), MCA, to set Medicaid provider reimbursement rates generally, it cannot ignore or change other statutes. That is the role of the legislature.

Pursuant to the authority granted to CFHHS as the rulemaking review authority for DPHHS and pursuant to 2-4-406, MCA, the CFHHS Interim Committee is submitting this letter in written objection to the department's adoption of MAR Notice 37-509. Under 2-4-406, MCA, the CFHHS Interim Committee does not consider the rule adoption contained in MAR Notice 37-509 to have been done in substantial compliance with 2-4-305, MCA, which specifically states that rules may not be adopted when they are in conflict with statute, which is clearly the case here.

Pursuant to 2-4-406, MCA, the department is required to respond to this letter within 14 days. After receipt of the response, the committee may withdraw or modify its objection. Section 2-4-406, MCA, further states:

(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.

(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.

Furthermore, if an administrative rule is not implemented in accordance with the requirements of Title 2, chapter 4, parts 3 and 4 of the Montana Administrative Procedure Act, it is not considered to be effective. Such would be the case here as the department is attempting to adopt a rule in direct conflict with statute.

Thank you for your consideration of this matter.

Sincerely,

Rep. Diane Sands  
CFHHS Chairperson

cc: Bernie Jacobs, DPHHS Chief Legal  
Geraldynn Driscoll, DPHHS Legal staff  
CFHHS Interim Committee  
Montana Secretary of State Linda McCollough

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