



Children, Families, Health, and Human Services Interim Committee

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62nd Montana Legislature

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September 1, 2011

To: Committee Members
From: Julianne Burkhardt, Staff Attorney
Re: DPHHS Administrative Rule Activity

The Department of Public Health and Human Services has filed the following notices with the Secretary of State's Office for publication in the Montana Administrative Register (MAR). (Notices in their entirety are available online at: <http://www.dphhs.mt.gov/legalresources/>)

MAR 2011 Issue No. 16 (August 25, 2011) At page 1722 of the 2011 MAR, the Department of Public Health and Human Services (DPHHS) has filed a NOTICE OF ADOPTION, AMENDMENT, AND REPEAL indicating its final adoption of a series of rules related to Home and Community Based Services for Elderly and Physically Disabled Persons. DPHHS received 18 comments. The majority of the comments received pertained to ARM 37.40.1435 and related to adult residential care facilities and the belief that these facilities should provide for private room accommodations for Medicaid consumers in this setting.

MAR 2011 Issue No. 16 (August 25, 2011) At page 1713 of the 2011 MAR, the DPHHS has filed a NOTICE OF ADOPTION and AMENDMENT indicating its final adoption of 37.85.105 EFFECTIVE DATES OF MONTANA MEDICAID PROVIDER FEE SCHEDULES and amendment of ARM 37.40.1421 for home and community based services for elderly and physically disabled persons. DPHHS received in excess of 70 comments. The majority of the comments received pertained to the targeted Medicaid rate reductions for assisted living facilities, but also the 2% provider rate reductions for this program.

MAR 2011 Issue No. 16 (August 25, 2011) At page 1718 of the 2011 MAR, the DPHHS has filed a NOTICE OF ADOPTION and AMENDMENT indicating its final adoption of 8 rules related to Reimbursement for the Provision to Persons With Developmental Disabilities of Services and the amendment of ARM 37.34.913 MEDICAID HOME AND COMMUNITY SERVICES PROGRAM: REIMBURSEMENT.

MAR 2011 Issue No. 16 (August 25, 2011) At page 1708 of the 2011 MAR, the DPHHS has filed a NOTICE OF AMENDMENT indicating its final adoption of 4 rules pertaining to Children's Mental Health Bureau rate reduction. DPHHS received a number of comments including a letter from the Children, Families, Health and Human Services Interim Committee concerning the draft fee schedule posted May 25, 2011, which appeared to significantly reduce

outpatient mental health therapy reimbursement rates significantly. This original fee schedule was incorrect and was withdrawn. The department conducted a second hearing and allowed additional time for comment.

MAR 2011 Issue No. 16 (August 25, 2011) At page 1700 of the 2011 MAR, the DPHHS has filed a NOTICE OF AMENDMENT indicating its final adoption of ARM 37.85.212. and 37.86.105 pertaining to the resource based relative value scale (RBRVS) and the reimbursement for physician administered drugs. Section 53-6-124(7), MCA, defines the resource based relative value scale (RBRVS) to mean the Medicare resource based relative value scale contained in the physician's Medicare fee schedule adopted by the Centers for Medicare and Medicaid Services (CMS) of the U.S. Department of Health and Human Services. Senate Bill 241 (SB241) did not change the definition of RBRVS. The RBRVS system is used nationwide by most health plans, including Medicare and most state Medicaid programs. The system was developed for Medicare by CMS and the American Medical Association (AMA) and implemented in 1992. In 1997 the Montana Department of Public Health and Human Services (the Department) adopted an RBRVS based fee schedule as the basis for Montana Medicaid's payment for almost all services provided to Montana Medicaid clients by physicians, mid-level practitioners, therapists, and other individual practitioners. Montana Medicaid has used an RBRVS system to calculate provider rates since 1997. The relative value unit (RVU) component of the RBRVS system is revised annually by CMS and the AMA. The RVUs for 2011 were adopted by CMS at 75 Federal Register 228, 73504 on November 29, 2010, and corrected at 76 Federal Register 7, 1670 on January 11, 2011. An RVU is a numerical value assigned to every medical procedure based on its relative value in relation to other medical services. There are thousands of medical procedures identified by current procedural terminology (CPT) codes. RVUs are added for new procedures and the RVUs for existing medical procedures may increase or decrease from year to year. The department annually proposes to amend ARM 37.85.212. The amendments proposed to this rule in MAR Notice No. 37-541 were the primary focus of the letter sent by the CFHHS Interim Committee to the DPHHS. Sen. Jason Priest and Sen. Mary Caferro commented at the hearing on ARM 37.85.212 and stated that, at a minimum, all physicians should be paid the same medicaid rates as in 2010. The new language of 53-6-125(2)(a), MCA, enacted by the Legislature in SB241 is: "For state fiscal years 2011 through 2013, the conversion factor is \$40.09. The conversion factor may be adjusted by the department in order to maintain reimbursement, at a minimum, at the fiscal year 2010 reimbursement rate." This language requires that every physician be paid no less than the same fee for a procedure as was paid in SFY 2010. The DPHHS interprets this language to require that the reimbursement rate in the aggregate as determined by the appropriation in House Bill 2 for physician services in the medicaid program. The legal department is currently preparing an opinion on whether this interpretation is accurate. However, section 53-6-125, MCA, deals entirely with physician reimbursement on a service by service basis and does not discuss or mention any consideration of aggregate funding or appropriation levels. Whether this means that the DPHHS will have to insure that the reimbursement for each covered service, taking into account the changes to the resource value units (RVUs) set by the CMS, and how this would be accomplished in the current system, is unknown.

MAR 2011 Issue No. 16 (August 25, 2011) At page 1628 of the 2011 MAR, the DPHHS has filed a NOTICE OF PROPOSED AMENDMENT with NO PUBLIC HEARING CONTEMPLATED regarding the amendment of ARM 37.86.702, 37.86.801 and 37.86.802 pertaining to hearing aids. The proposed amendments add audiologists as a type of provider eligible for reimbursement for dispensing hearing aids.

MAR 2011 Issue No. 16 (August 25, 2011) At page 1628 of the 2011 MAR, the DPHHS has filed a NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT regarding the amendment of ARM 37.86.2907 pertaining to Medicaid inpatient hospital stays. The hearing is schedule for September 14, 2011, at 10:00 a.m. in the auditorium of the DPHHS building. According to the DPHHS, the proposed amendment corrects the base reimbursement rates for Medicaid inpatient hospital stays that were incorrectly reported in MAR Notice 37-545.

MAR 2011 Issue No. 15 (August 11, 2011) At page 1482 of the 2011 MAR, the DPHHS has filed a NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT AND REPEAL regarding the adoption of 1 new rule and the amendment and repeal of a series of rules pertaining to pools, spas and other water features. The hearing is schedule for August 31, 2011, at 10:00 a.m. in the auditorium of the DPHHS building.

MAR 2011 Issue No. 15 (August 11, 2011) At page 1524 of the 2011 MAR, the DPHHS has filed a NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AND REPEAL regarding the adoption of 14 new rules pertaining to the Montana Marijuana Act and the repeal of existing rules. The hearing is schedule for August 31, 2011, at 1:30 p.m. in the auditorium of the DPHHS building. An issue with respect to these rules is that in several locations the rules refer to the "medical" marijuana. Senate Bill 423 codified at Chapter 419 refers to the act as the "Montana Marijuana Act." The DPHHS is aware of this issue and it is expected that following comment at the hearing, this discrepancy will be corrected.

MAR 2011 Issue No. 14 (July 28, 2011) At page 1382 of the 2011 MAR, the DPHHS has filed a NOTICE OF AMENDMENT AND REPEAL indicating its final adoption of amendments to 5 rules and the repeal of 10 rules related to home and community-based services for youth with serious emotional disturbance.

MAR 2011 Issue No. 14 (July 28, 2011) At page 1384 of the 2011 MAR, the DPHHS has filed a NOTICE OF AMENDMENT indicating its final adoption of amendments to 7 rules pertaining to Medicaid acute services reimbursement and early and periodic screening, diagnostic and treatment. The DPHHS received several comments to these amendments focusing on rate cuts implemented on August 1, 2011. The Department responded that it does not believe the rate cuts will be material enough to prevent a delivery of services.

MAR 2011 Issue No. 14 (July 28, 2011) At page 1386 of the 2011 MAR the DPHHS has filed a NOTICE OF ADOPTION AND AMENDMENT indicating its final adoption of 1 new rule and amendments to ARM 37.40.705, 37.40.1105, and 37.40.1302 pertaining to home health care and personal assistance service. The department received comments primarily concerned with

reimbursement rate cuts.

MAR 2011 Issue No. 14 (July 28, 2011) At page 1388 of the 2011 MAR, the DPHHS has filed a NOTICE OF AMENDMENT indicating the amendment of ARM 37.79.102 pertaining to the Healthy Montana Kids definition of the federal poverty level. No comments were received to this amendment.

MAR 2011 Issue No. 14 (July 28, 2011) At page 1389 of the 2011 MAR, the DPHHS has filed a NOTICE OF AMENDMENT indicating the amendment of ARM 37.86.3607 pertaining to the rates of reimbursement for the provision by provider entities of Medicaid funded targeted case management services to persons with developmental disabilities.

MAR 2011 Issue No. 14 (July 28, 2011) At page 1391 of the 2011 MAR, the DPHHS has filed a NOTICE OF ADOPTION AND AMENDMENT indicating its final adoption of 1 new rule and amendments to ARM 37.86.2801, 37.86.2901 and 37.86.2907 pertaining to Medicaid inpatient hospital services.

MAR 2011 Issue No. 14 (July 28, 2011) At page 1394 of the 2011, MAR the DPHHS has filed a NOTICE OF AMENDMENT indicating the amendment of ARM 37.86.3515, 37.88.907, 37.89.125, 37.89.523, and 37.90.408 pertaining to mental health services for adults. No comments were received by the DPHHS.

MAR 2011 Issue No. 14 (July 28, 2011) At page 1375 of the 2011 MAR, the DPHHS has filed a NOTICE OF AMENDMENT indicating the amendment as proposed of ARM 37.40.307, 37.40.325, 37.40.330, and 37.40.361 pertaining to nursing facility reimbursements. Several commenters stated that these rules implement a 2% provider rate cut. The cost of caring for residents is increasing, but instead of an inflationary increase to account for these costs the rates are being cut. The Department responded by stating that Federal laws or regulations do not mandate that established Medicaid rates must cover all of the actual costs incurred by nursing facility providers. According to the DPHHS, this is not a standard by which the legal adequacy of rates has been measured in the past, nor is it the standard that will be utilized in the future. The Department has developed rates which are reasonable, adequate, and in compliance with all requirements. The price is reflective of many factors that impact the ways that nursing facilities do business and is set at a level that is fair when considering all of those factors together.

MAR 2011 Issue No. 14 (July 28, 2011) At page 1374 of the 2011 MAR, the DPHHS has filed a NOTICE OF ADOPTION indicating its final adoption of 13 new rules pertaining to the Montana Medicaid Provider Incentive Program for electronic healthcare records. No comments or testimony were received to the proposed rules.

MAR 2011 Issue No. 13 (July 14, 2011) At page 1311 of the 2011 MAR, the DPHHS has filed a CORRECTED NOTICE OF ADOPTION AND REPEAL. This corrected notice is being filed to correct an error in the interlining and underlining of a date in new rule ARM 37.34.224 and the number of the statutory citation for authority in this same new rule.

MAR 2011 Issue No. 13 (July 14, 2011) At page 1313 of the 2011 MAR, the DPHHS has filed a NOTICE OF AMENDMENT indicating the amendment as proposed of ARM 37.78.101 pertaining to Temporary Assistance For Needy Families (TANF). No comments were received.

MAR 2011 Issue No. 13 (July 14, 2011) At page 1287 of the 2011 MAR, the DPHHS filed an AMENDED NOTICE OF PUBLIC HEARING AND EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT indicating that the DPHHS scheduled a second hearing following the request made by the CFHHS Interim Committee which was held on July 21, 2011, pertaining to the resource based relative value scale (RBRVS) and the reimbursement for physician administered drugs.

MAR 2011 Issue No. 13 (July 14, 2011) At page 1290 of the 2011 MAR, the DPHHS filed an AMENDED NOTICE OF PUBLIC HEARING AND EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT indicating that the DPHHS scheduled a second hearing following the request made by the CFHHS Interim Committee which was held on July 21, 2011, pertaining to the Children's Mental Health Bureau rate reduction.

MAR 2011 Issue No. 13 (July 14, 2011) At page 1293 of the 2011 MAR, the DPHHS filed a NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT indicating that the DPHHS scheduled a hearing which was held on August 3, 2011, regarding the amendment of ARM 37.82.101, 37.82.1005, and 37.82.1320 pertaining to Medicaid eligibility.

MAR 2011 Issue No. 12 (June 23, 2011) At page 1077 of the 2011 MAR, the DPHHS filed a NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT AND REPEAL indicating that the DPHHS scheduled a hearing which was held on July 13, 2011, regarding the proposed adoption of 12 new rules, the amendment of 16 rules, and the repeal of 4 rules pertaining to home and community-based services for elderly and people with physical disabilities.

MAR 2011 Issue No. 12 (June 23, 2011) At page 1154 of the 2011 MAR, the DPHHS has filed a NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT AND REPEAL regarding the adoption as proposed of 1 new rule and the amendment and repeal of a series of rules pertaining to psychiatric residential treatment facility reimbursement.

MAR 2011 Issue No. 12 (June 23, 2011) At page 1059 of the 2011 MAR, the DPHHS filed a NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT indicating that the DPHHS scheduled a hearing which was held on July 13, 2011, pertaining to a series of rules regarding licensure of laboratories conducting analyses of public water supplies.

MAR 2011 Issue No. 11 (June 23, 2011) At page 1008 of the 2011 MAR, the DPHHS filed a NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT indicating that the DPHHS scheduled a hearing which was held on June 29, 2011, pertaining to the adoption of 8 new rules and the amendment of ARM 37.34.913 regarding reimbursement for

the provision to persons with developmental disabilities of services and items covered as benefits of the various programs of services administered by the developmental disabilities program.

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