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Select Committee on Efficiency in Government

62nd Montana Legislature

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LEGAL MEMORANDUM

TO: Sue O'Connell, Research Analyst, Select Committee on Efficiency in Government

FROM: David S. Niss, Staff Attorney

RE: Legal Review of Certain Proposed Changes to Medicaid Laws

DATE: January 5, 2012

I
INTRODUCTION

You recently provided me with a document entitled "Select Committee On Efficiency In Government – Proposed Changes to Medicaid Laws and Rules" containing 23 proposed changes to Medicaid law and rules that have been submitted to the Select Committee on Efficiency in Government (Committee). You informed me that you believed that there might be legal issues in proposed suggestions 7, 11, and 22 and asked that I review them for the Committee. This Memorandum constitutes the results of that review.

II
DISCUSSION

A. Suggestion 7 – Amend 2-15-2230, MCA.

According to a separate document you gave me entitled "Stakeholder Suggestions" that contains additional detail on the three proposals you requested I review, the stakeholders have suggested four paragraphs of language that would apparently be added to the current language of section 2-15-2230, MCA, that requires a paragraph on dispute resolution in every contract for human services issued by the Department of Public Health and Human Services (Department). The additional four paragraphs

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would require that the Administrator of the Disability Services Division of the Department resolve any issue within 10 days, and if he failed to do so or if the Administrator decision is appealed, a "neutral third party" would make the decision. The suggestion also contains detail on how that neutral party would be chosen.

There is nothing inherently discriminatory or unfair, and therefore unlawful under an equal protection or substantive due process analysis, about the manner in which a contract dispute subject to section 2-15-2230, MCA, would be resolved under the amendment proposed to that section.[1] However, if the proposed amendment intends to subject the Department and the contractor to binding arbitration, then some review needs to be made here of the constitutionality of the Legislature providing for a waiver of the constitutional right of access to the courts[2], full legal redress[3], due process of law[4], and the right to a jury trial[5].

The Montana Supreme Court has held that arbitration clauses in contracts are generally enforceable, absent a showing that the arbitration agreement was (1) not within the reasonable expectation of a party to the contract who did not write the contract or (2) unduly oppressive, unconscionable, or otherwise against public policy. Passage v. Prudential-Bache Securities, Inc., 223 Mont. 60, 727 P.2d 1298 (1986), and Chor v. Piper, Jaffray & Hopwood, Inc., 261 Mont. 143, 862 P.2d 26 (1993).

The language that has been suggested for inclusion in section 2-15-2230, MCA, establishes a deadline for a division administrator to make a decision regarding a contract dispute, provides an appeal to arbitration from the administrator's decision, and provides a method for choosing an arbitrator. Nothing in that language appears to be unduly oppressive, unconscionable, or otherwise against public policy. While it is possible that the language of the arbitration clause in a Department contract implementing section 2-15-2230, MCA, might contain language that is itself unduly oppressive, unconscionable, or otherwise against public policy, there's no indication in the material you furnished that that will be the case. Based on these facts, I see no legal difficulty with the language or purpose of the proposed amendment to section 2-15-2230, MCA.

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[1]In fact, the Federal Arbitration Act at 9 USC 2 requires that the courts enforce arbitration provisions to the same extent as other provisions in a contract.

[2]Art. II, sec. 16, Mont. Const.

[3]Art. II, sec. 16, Mont. Const.

[4]Art. II, sec. 17, Mont. Const.

[5]Art. II, sec. 26, Mont. Const.

B. Suggestion 11 – Undertake a 5-Year Pilot Project on Tort Reform.

Regarding this recommendation, your memo states: “This suggestion would offer medical liability protections to health care providers who serve Medicaid patients. It would require collection and analysis of data, to determine whether cost savings occurred. The suggestion did not list specific tort reforms but did provide a list of bills that the 2011 Legislature considered but did not pass.”

Because the suggestion did not make any recommendation for any specific reforms, it’s difficult to judge whether there are any legal impediments to any specific reform. “Tort reform” has in the past taken many different forms, as the list of bills that was provided by the person(s) making this recommendation that were introduced in the 62nd session of the Legislature indicates. Generally, these bills provided for the timely filing and resolution of medical malpractice claims (HB408), offset of personal consumption expenses in survival actions (HB275), limiting defensive medicine (HB405), medical liability protection for hard-to-recruit medical subspecialties (HB464), defenses and liability of remaining defendants in a negligence action after one or more other defendants have settled with the plaintiff (HB531), and preventing the duplication of health insurance benefits (HB555). Various interim study committees of the Legislature have also considered other tort reform measures, these being a revision to the laws of comparative negligence and the elimination of joint liability, payment of attorney fees by the losing party to a lawsuit, providing for nonbinding arbitration in civil action involving less than $25,000, a flexible system for insurance premium rate regulation, and limitations on the grounds for cancellation or nonrenewal of property or casualty insurance[6]. Other legislation recommended by a different interim study committee studying tort reform included the tolling of statutes of limitations, changes to the Montana Medical Legal Panel Act[7], limitations on medical malpractice noneconomic damages, periodic payment of future damages, limitations on medical malpractice contingency attorney fees, experience and rates reports by medical malpractice insurers, and requiring physicians to carry professional liability insurance[8]. From this review, it’s clear that “tort reform” can mean many different things.

With regard to the legality of any pilot program, there are two areas of constitutional law to be considered: first, whether the differing application of the law

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[6]Liability Issues: Tort Reform or Insurance Regulation, A Report to the 50th Legislature by the Joint Interim Subcommittee on Liability issues, Montana Legislative Council [now Legislative Services Division] (1986).

[7]Title 27, chapter 6, MCA.

[8]Medical Malpractice and Tort Reform: Issues of Insurance Costs, Coverage, Caps, and Compensation, Montana Legislative Council [now Legislative Services Division] (1994).

inherent in any trial or pilot program on less than a statewide basis denies equal protection of the law under the Fourteenth Amendment to the U.S. Constitution or Article II, sec. 4, of the Montana Constitution and, secondly, whether a specific tort reform measure denies any other constitutional right. As we've discussed, I've previously prepared for you in the context of your work for another legislative interim committee a legal memorandum regarding the constitutionality of legislation creating an experimental mail ballot election[9]. That memorandum concluded that the constitutional principle of equal protection of the law embodied in both the federal and the Montana Constitutions generally did not prevent the application of different provisions of law to different segments of the population on an experimental or pilot project basis as long as there was a rational basis for choosing that part of the population that is subject to the test or pilot program.[10] As far as a denial of any other constitutional right caused by the specific proposal is concerned, an accurate assessment of the constitutionality of any type of tort reform cannot be made in the absence of the particulars of that reform. However, the constitutional guarantees that any tort reforms must successfully navigate are those guarantees raised previously in regard to the constitutionality of binding arbitration: access to the courts, full legal redress, due process of law, and the right to a jury trial[11]. The application of those fundamental rights to any tort reform proposal depends on the details of that proposal.

C. Suggestion 22 – Require DPHHS to Review Statutes and Administrative Rules to Reduce the Burden of Requests for Proposals.

In your description of this recommendation you state: "Stakeholders suggest that the review also indicate the appropriate duration of contracts and that the Legislature waive the RFP process for DD providers when the contractor has met all contract and quality assurance measures. Changes to RFP requirements may require changes to the Montana Procurement Act (Title 18, chapter 4, MCA)."

By this description, what the venders of state-financed services are apparently seeking is an extension of the original term of the contract without having to again go through the request for proposal (RFP) process. What this suggestion therefore seeks is some type of automatic renewal or renewal at the option of the vendor. A change such as this recommendation seeks is impacted by the Montana Procurement Act[12]

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[9]Legal Memorandum concerning the Constitutionality of Legislation Creating Experimental Mail Ballot Election (October 2007).

[10]Id., pages 2-4.

[11]See footnotes 2 through 5, page 2.

[12]Title 18, chapter 4, MCA.

because that Act specifies the maximum length of every contract made pursuant to the Act. Section 18-4-313, MCA provides as follows:

> **18-4-313. Contracts -- terms, extensions, and time limits.** (1) Except as provided in subsection (2) or unless otherwise provided by law, a contract, lease, or rental agreement for supplies or services may not be made for a period of more than 7 years. A contract, lease, or rental agreement may be extended or renewed if the terms of the extension or renewal, if any, are included in the solicitation, if funds are available for the first fiscal period at the time of the agreement, and if the total contract period, including any extension or renewal, does not exceed 7 years. Payment and performance obligations for succeeding fiscal periods are subject to the availability and appropriation of funds for the fiscal periods.
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> (2) The contract term limit specified in subsection (1) does not apply to:
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> (a) a contract for hardware, software, or other information technology resources, which may be made for a period not to exceed 10 years;
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> (b) a department of revenue liquor store contract governed by the term specified in 16-2-101;
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> (c) a department of corrections contract governed by the term specified in 53-1-203, 53-30-505, or 53-30-608; and
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> (d) the department of administration state employee group benefit plans contracts governed by the term specified in 2-18-811, including group benefit plan contracts made in partnership with the Montana university system group benefit plan.
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> (3) Prior to the issuance, extension, or renewal of a contract, it must be determined that:
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> (a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and
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> (b) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.
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> (4) If funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled.

From the foregoing language it's clear that the statute would have to be amended to provide for at least one extension of some length of the type of contract held by the vendor making this recommendation beyond the maximum 7-year term now specified in subsection (1). Alternately, it could be provided that the “extension” referred to in subsections (1) and (3) include an extension beyond the 7-year term referred to in subsection (1). Regardless of which change is made, however, subsection (3)(b) should also be amended to reflect the fact that an extension beyond 7 years may be made not only for the purpose of “economies in state procurement”, but for the

economies of the vendor as well.

To the extent that any automatic extension or extension at the option of the vendor creates an exclusive license by the state in violation of the Fourteenth Amendment, it has been held by the U.S. Supreme Court in Cleburne v. Cleburne Living Ctr., 473 US 432 (1985), that where state economic activity is challenged, the general rule is that the activity is presumed valid and is to be sustained if the activity is rationally related to a legitimate state interest. That court also held, in the same opinion, that if there is no claim of discrimination on the basis of some suspect class, a state need only show that a rational relationship exists between a legitimate state interest and the economic activity regulated as the state has chosen. Based upon the Supreme Court's opinion in Cleburne, other courts have upheld exclusive licenses in the form of contracts by governmental agencies. See, e.g., Foto, USA v. Board of Regents of the University System of Florida, 141 F.3d 1032 (1998) (exclusive contract for photographing university graduates as they received their degrees).

Finally, I should add that no review has been made here of federal Medicaid statutes and regulations. If any of the proposed changes to the state statutes governing the Montana Medicaid program conflict with federal statutes or regulations and the administering state agency cannot comply with both the federal and state laws, it's highly likely that the courts would conclude that the conflicting state statutes are preempted by federal law because of the Supremacy Clause in the U.S. Constitution.[13]

III
CONCLUSION

Suggestions 7, 11, and 22, as contained in the list of suggestions being considered by the Select Committee on Efficiency in Government, contain no patently unconstitutional proposals. However, some care should be taken to be sure that the language of any statutory changes is logically related to the purpose of the change. In the case of suggestion number 22, regarding extension of state contracts to avoid the RFP process, certain amendments will have to be made to section 18-4-313, MCA, to implement the suggestion.

cc: Members, Select Committee on Efficiency in Government

[13]Art. VI, U.S. Constitution.