

**BEFORE THE
ADMINISTRATIVE RULES COMMITTEE
OF THE
NORTH DAKOTA LEGISLATIVE COUNCIL**

N.D. Admin. Code Chapters)	<u>REPORT OF THE</u>
75-02-10 and 75-03-24,)	<u>DEPT. OF HUMAN SERVICES</u>
Aid to Vulnerable Aged, Blind and)	March 14, 2012
Disabled Individuals, and Expanded)	
Service Payments for the Elderly)	
and Disabled)	
(Pages 277-291))	

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For its report, the North Dakota Department of Human Services states:

1. The proposed amendments to N.D. Admin. Code chapter 75-02-10 and creation of N.D. Admin. Code chapter 75-03-24 are the result of statutory changes made by the Legislative Assembly in 2011 Senate Bill No. 2077.
2. These rules are not related to changes in a federal statute or regulation.
3. The Department of Human Services uses direct and electronic mail as the preferred ways of notifying interested persons of proposed rulemaking. The Department uses a basic mailing list for each rulemaking project that includes the county social service board directors, the regional human service centers, Legal Services offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the Department. Additionally, the Department constructs relevant mailing lists for specific rulemaking. The Department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed

rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

The Department conducts public hearings on all substantive rule-making. Oral comments are recorded. Oral comments, as well as any written comments that have been received, are summarized and presented to the Department's executive director, together with any response to the comments that may seem appropriate and a re-drafted rule incorporating any changes occasioned by the comments.

4. A public hearing on the proposed rules was held in Bismarck on December 29, 2011. The record was held open until 5:00 p.m. on January 9, 2012, to allow written comments to be submitted. A summary of the comments received is attached to this report.
5. The cost of giving public notice, holding a hearing, and the cost (not including staff time) of developing and adopting the rules was \$2,039.17.
6. The proposed rules amend chapter 75-02-10 and create chapter 75-03-24. The following specific changes are made:
 - Section 75-02-10-01. Section 75-02-10-01 is amended to identify that definitions found in North Dakota Century Code chapter 50-24.5 apply to chapter 75-02-10 and to remove duplicate definitions.
 - Section 75-02-10-02. Section 75-02-10-02 is amended to identify benefits available for recipients of aid to vulnerable aged, blind, and disabled individuals.
 - Section 75-02-10-06.1. Section 75-02-10-06.1 relating to adaptive assessment services is repealed.

Chapter 75-03-24. Chapter 75-03-24 is created to establish a separate set of rules applicable to the Expanded Service Payments to the Elderly and Disabled program and includes definitions, eligibility criteria, authorization of services, application, duty to establish eligibility, services covered, residency, and appeals.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The proposed amendments are not expected to have an impact on the regulated community in excess of \$50,000. A regulatory analysis for each chapter was prepared and is attached to this report.
8. A small entity regulatory analysis and small entity economic impact statement were prepared for each chapter and are attached to this report.
9. These rules are not expected to have a fiscal impact on state revenues and expenditures, including on any funds controlled by the Department.
10. A constitutional takings assessment was prepared and is attached to this report.
11. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Jonathan Alm
Legal Advisory Unit
North Dakota Department of Human Services
March 14, 2012

CHAPTER 75-02-10
AID TO VULNERABLE AGED, BLIND, AND DISABLED INDIVIDUALS

Section

75-02-10-01	Definitions
75-02-10-02	Benefits Available Under This Chapter
75-02-10-03	Application and Redetermination
75-02-10-04	Applicant's or Guardian's Duty to Establish Eligibility
75-02-10-05	Eligibility Criteria
75-02-10-06	Functional Assessment
75-02-10-06.1	Adaptive Assessment Services
75-02-10-07	Decision and Notice
75-02-10-08	Disqualifying Transfers
75-02-10-09	Residency
75-02-10-10	County Administration

SECTION 1. Section 75-02-10-01 of the North Dakota Administrative Code is amended as follows:

75-02-10-01. Definitions. ~~For~~ The terms used in this chapter have the same meaning as in North Dakota century code chapter 50-24.5. In addition, for purposes of this chapter, unless the context requires otherwise:

1. "Activities of daily living" means bathing, dressing, toileting, transferring, eating, bed mobility, medication management, and personal hygiene.
2. ~~"Aged" means at least sixty-five years of age.~~
3. "Basic care facility" means a residence, not licensed under North Dakota Century Code chapter 23-16 by the department, that provides room and board to five or more individuals who are not related by blood or marriage to the owner or manager of the residence and who, because of impaired capacity for independent living, require health, social, or personal care services, but do not require regular twenty-four-hour medical or nursing services and:
 - a. Makes response staff available at all times to meet the twenty-four-hour per day scheduled and unscheduled needs of the individual; or
 - b. Is kept, used, maintained, advertised, or held out to the public as an Alzheimer's, dementia, or special memory care facility.
4. ~~"Blind" has the same meaning as the term has when used by the social security administration in the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.]~~
5. ~~"Congregate housing" means housing shared by two or more individuals not related to each other which is not provided in an institution.~~
6. ~~3.~~ "Countable income" means gross income reduced by:
 - a. The cost of guardianship or conservatorship fees actually charged, but no more than five percent of monthly gross income;

- b. The cost of the medicare premium, but only if the individual is ineligible for medicare cost-sharing benefits described in subdivision a of subsection 19 of section 75-02-02.1-01 as a qualified medicare beneficiary or a special low-income medicare beneficiary;
 - c. Court-ordered child support payments actually paid on behalf of a minor child who is not a member of the individual's medicaid unit; and
 - d. For individuals receiving benefits provided under subsection 1 or 2 of section 75-02-10-02:
 - (1) In the month the individual enters the facility, the medically needy income level for a family of the size of the family in which the individual was a member at the beginning of the month; and
 - (2) Sixty-five dollars plus one-half of the remaining monthly gross earned income.
7. ~~"County agency" means the county social service board.~~
8. ~~"Department" means the department of human services.~~
9. ~~"Disabled" has the same meaning as the term has when used by the social security administration in the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].~~
10. ~~"Eligible beneficiary" means a resident of this state who:~~
- a. ~~(1) Is aged; or~~
 - ~~(2) Is at least eighteen years of age and is disabled or blind;~~
 - b. ~~Has applied for and is eligible to receive benefits under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.], provided that an individual who was eligible to receive benefits under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.] and who was receiving benefits under title XVI before January 1, 1995, is not ineligible because that individual is not eligible to receive benefits under title XIX;~~
 - c. ~~Based on a functional assessment, is not severely impaired in any of the activities of daily living of toileting, transferring to or from a bed or chair, or eating and:~~
 - ~~(1) Has health, welfare, or safety needs, including a need for supervision or a structured environment, which requires care in a licensed adult family foster care home or a licensed basic care facility; or~~
 - ~~(2) Is impaired in three of the following four instrumental activities of daily living: preparing meals, doing housework, taking medicine, and doing laundry; and~~
 - d. ~~Is determined to be eligible pursuant to rules adopted by the department.~~
- 11.4. "Gross income" includes any income at the disposal of an applicant, recipient, or responsible relative; any income with respect to which an applicant, recipient, or responsible relative has a legal interest in a

liquidated sum and the legal ability to make the sum available for support or maintenance; or any income an applicant, recipient, or responsible relative has the lawful power to make available or to cause to be made available. It includes any income that would be applied in determining eligibility for benefits under chapter 75-02-02.1; any income, except occasional small gifts, that would be disregarded in determining eligibility for benefits under chapter 75-02-02.1; annuities, pensions, retirement, and disability benefits to which an applicant or recipient, or spouse of an applicant or recipient, may be entitled, including veterans' compensation and pensions of any type, old-age survivors, and disability insurance benefits; railroad retirement benefits; and unemployment compensation.

- 12.5. ~~"Institution" means an establishment that makes available some treatment or services beyond food or shelter to four or more individuals who are not related to the proprietor~~ a facility licensed under North Dakota century code chapter 23-09.3.
- 13.6. "Instrumental activities of daily living" means activities to support independent living, including housekeeping, shopping, laundry, transportation, and meal preparation.
- 14.7. "Necessary benefits" means those benefits:
- a. Provided under this chapter;
 - b. Identified by the department, or a county agency under the direction and supervision of the department, as appropriate to meet the needs of an applicant or recipient; and
 - c. Which, when provided in coordination and conjunction with benefits available from any other source, represent the means least costly to the department of meeting the needs of the applicant or recipient.
15. ~~"Proprietor" means an individual responsible for day to day administration and management of a facility.~~
16. ~~"Related by blood or marriage to the owner or manager" means an individual who is a spouse or former spouse of the owner or manager or is a parent, stepparent, grandparent, stepgrandparent, child, stepchild, grandchild, stepgrandchild, brother, sister, half brother, half sister, stepbrother, or stepsister of the owner or manager or the owner or manager's spouse or former spouse.~~
17. ~~"Related to the proprietor" means an individual who is a proprietor's spouse or former spouse, or a parent, stepparent, grandparent, stepgrandparent, child, stepchild, grandchild, stepgrandchild, brother, sister, half brother, half sister, stepbrother, or stepsister of proprietor or proprietor's spouse or former spouse.~~
18. ~~"Remedial care" means services that produce the maximum reduction of an eligible beneficiary's physical or mental disability and the restoration of an eligible beneficiary to the beneficiary's best possible functional level.~~

History: Effective May 1, 1995; amended effective January 1, 1997; June 1, 2002; April 1, 2012.

General Authority: NDCC 50-06-16, 50-24.5-02(8)

Law Implemented: NDCC 50-24.5

SECTION 2. Section 75-02-10-02 of the North Dakota Administrative Code is amended as follows:

75-02-10-02. Benefits available under this chapter. To the extent that an eligible individual lacks income sufficient to meet the cost of necessary benefits, the following benefits are available:

1. ~~Supplementation of the income of users of adult family foster care services;~~
2. ~~Supplementation of the income of users of basic care services;~~
3. ~~Homemaker services;~~
4. ~~Chore services;~~
5. ~~Respite care;~~
6. ~~Home health aide services;~~
7. ~~2. Case management;~~
8. ~~Family home care;~~
9. ~~Adaptive assessment; and~~
10. ~~3. Other services the department determines to be essential and appropriate to sustain an individual in the individual's home and community, and to delay or prevent institutional care.~~
4. Room and board which is limited to the rate set for services in that facility by the department.

History: Effective May 1, 1995; amended effective June 1, 2002; April 1, 2012.

General Authority: NDCC 50-06-16, 50-24.5-02(8)

Law Implemented: NDCC 50-24.5

SECTION 3. Section 75-02-10-06.1 of the North Dakota Administrative Code is repealed:

~~**75-02-10-06.1. Adaptive assessment services.** Adaptive assessment services are available to an individual receiving services under section 75-02-10-02, except subsection 1 or 2, only if the individual:~~

1. ~~Is eighteen years of age or older;~~
2. ~~Seeks to enhance independence and functional capabilities resulting in a direct benefit of increased performance of personal cares and routine household tasks; and~~
3. ~~Agrees to comply with recommendations of an interdisciplinary team regarding the use of adaptive devices, equipment, or modifications to the individual's surroundings.~~

History: Effective January 1, 1997; amended effective June 1, 2002; repealed effective April 1, 2012.

General Authority: NDCC 50-06-16, 50-24.5-02(8)

Law Implemented: NDCC 50-24.5

CHAPTER 75-03-24
Expanded Service Payments to the Elderly and Disabled

Section	
75-03-24-01	Definitions
75-03-24-02	Eligibility Criteria
75-03-24-03	Eligibility Determination - Authorization of Services
75-03-24-04	Application
75-03-24-05	Applicant's or Guardian's Duty to Establish Eligibility
75-03-24-06	Functional Assessment
75-03-24-07	Services Covered Under the Ex-SPED Program - Programmatic Criteria
75-03-24-08	Residency
75-03-24-09	Denial, Reduction, and Termination of Services - Appeal
75-03-24-10	Payment Under the Ex-SPED Program
75-03-24-11	Department to Recover Funds Upon Establishment of Noncompliance
75-03-24-12	Administration

SECTION 4. Chapter 75-03-24 of the North Dakota Administrative Code is created as follows:

75-03-24-01. Definitions. For purposes of this chapter, unless the context requires otherwise:

1. "Activities of daily living" means bathing, dressing, toileting, transferring, eating, bed mobility, medication management, and personal hygiene.
2. "Blind" has the same meaning as the term has when used by the social security administration in the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].
3. "Department" means the department of human services.
4. "Department's designee" means the county social service board.
5. "Disabled" has the same meaning as the term has when used by the social security administration in the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].
6. "Institution" means an establishment that makes available some treatment or services beyond food or shelter to four or more individuals who are not related to the proprietor.
7. "Instrumental activities of daily living" means activities to support independent living, including housekeeping, shopping, laundry, transportation, and meal preparation.
8. "Ex-SPED program pool" means the list maintained by the department which contains the names of clients for whom Ex-SPED program funding is available when the clients' names are transferred from the Ex-SPED program pool to Ex-SPED program active status.

History: Effective April 1, 2012.
General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-02. Eligibility criteria. An individual may receive necessary benefits under this chapter if the individual:

1. Is a resident of this state;
2. Is:
 - a. Sixty-five years of age or older; or
 - b. Eighteen years of age or older and disabled or blind;
3. Has applied for and been found eligible for medicaid benefits;
4. Has countable income which does not exceed an amount equal to the cash benefit under title XVI of the Social Security Act [42 U.S.C. 1381, et seq.]; and
5. Based on a functional assessment made in accordance with this chapter, is not severely impaired in any of the activities of daily living of toileting, transferring to or from a bed or chair, or eating; and
 - a. Has health, welfare, or safety needs, including a need for supervision or a structured environment; or
 - b. Is impaired in three of the following four instrumental activities of daily living:
 - (1) Preparing meals;
 - (2) Doing housework;
 - (3) Taking medicine; and
 - (4) Doing laundry.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-03. Eligibility determination - Authorization of services.

1. The department shall provide written notice to the department's designee of the effective date of the applicant's eligibility for services funded under the Ex-SPED program.
2. The department's designee is responsible for:
 - a. Verifying that the person transferred to active status continues to meet the eligibility criteria for placement into the Ex- SPED program pool;
 - b. Developing a care plan;
 - c. Authorizing covered services in accordance with department policies and procedures; and
 - d. Assuring that other potential federal and third-party funding sources for similar services are sought first.
3. An individual who is discharged from an inpatient hospital stay, skilled nursing facility, swing bed facility, long term care facility or basic care facility or who has been off of the Ex-SPED program for fewer than 60 days, does not have to go through the Ex-SPED program pool to receive services through the Ex-SPED program provided the individual meets all eligibility criteria in section 75-03-24-02.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-04. Application.

1. All individuals wishing to make application for benefits under this chapter must have the opportunity to do so, without delay.
2. An application is a request made by an individual desiring benefits under this chapter, or by a proper individual seeking such benefits on behalf of another individual, to a department's designee. A proper individual means any individual of sufficient maturity and understanding to act responsibly on behalf of the applicant.
3. An application consists of an application for services, which includes a functional assessment.
4. Application forms must be signed by the applicant, an authorized representative, or, if the applicant is incompetent or incapacitated, someone acting responsibly for the applicant.
5. Information concerning eligibility requirements, available services, and the rights and responsibilities of applicants and recipients must be furnished to all who require it.
6. The date of application is the date an application, signed by an appropriate individual, is received by the department's designee.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-05. Applicant's or guardian's duty to establish eligibility. The applicant or guardian of the applicant shall provide information sufficient to establish eligibility for benefits, including a social security number and proof of age, identity, residence, blindness, disability, functional limitation, financial eligibility, and such other information as may be required by this chapter.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-06. Functional assessment.

1. For purposes of this section, "functional assessment" means an instrument used to record basic demographic and medical information about an individual, including age, date of birth, spoken language, marital status, individuals residing with, emergency contacts, medical resources, health care coverage, and source and reason for referral; and to secure measurable information regarding:
 - a. Physical health;
 - b. Cognitive and emotional functioning;

- c. Activities of daily living;
 - d. Instrumental activities of daily living;
 - e. Informal supports;
 - f. Need for twenty-four-hour supervision;
 - g. Social participation;
 - h. Physical environment;
 - i. Financial resources;
 - j. Adaptive equipment or environmental modification, or both; and
 - k. Other information about the individual's condition not recorded elsewhere.
- 2. An initial functional assessment, using an appropriate form determined by the department, must be completed as a part of the application for benefits under this chapter. Eligibility redetermination must be completed at least biannually.
 - 3. A functional assessment must include an interview with the individual in the home where the individual resides.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-07. Services covered under the Ex-SPED program - Programmatic criteria. Room and board costs may not be paid in the Ex-SPED service payment. The following categories of services are covered under the Ex-SPED program and may be provided to a client:

- 1. The department may provide adult day care services to a client:
 - a. Who requires assistance in activities of daily living or instrumental activities of daily living;
 - b. Who is able to participate in group activities; and
 - c. Who, if the client does not live alone, has a primary caregiver who will benefit from the temporary relief of care giving.
- 2. The department may provide adult family foster care, using a licensed adult family foster care provider, to a client eighteen years of age or older:
 - a. Who resides in a licensed adult family foster care home;
 - b. Who requires care or supervision;
 - c. Who would benefit from a family environment; and
 - d. Whose required care does not exceed the capability of the foster care provider.
- 3. The department may provide chore services to a client for one-time, intermittent, or occasional activities which would enable the client to remain in the home. Activities such as heavy housework and periodic cleaning, professional extermination, snow removal, and emergency response systems may be provided. Clients receiving emergency response services must be cognitively and physically capable of activating the emergency response system. The activity must be the responsibility of the client and not the responsibility of the landlord.
- 4. The department may provide environmental modification to a client:

- a. Who owns the home to be modified;
 - b. When the modification will enable the client to complete the client's own personal care or to receive care and allow the client to safely stay in the home;
 - c. When no alternative community resource is available; and
 - d. Limited to labor and materials for installing safety rails.
- 5. The department may provide family home care services to a client:
 - a. Who lives in the same residence as the care provider on a twenty-four-hour basis;
 - b. Who agrees to the provision of services by the care provider;
 - c. Whose care provider meets the definition of a family member in North Dakota century code section 50-06.2-02 and is enrolled as a qualified service provider.
- 6. The department may provide homemaker services to a client who needs assistance with environmental maintenance activities including light housekeeping, laundry, meal planning and preparation, and shopping on an intermittent or occasional basis and who lives alone or with an adult who is unable or is not obligated to perform homemaking activities. The department may provide essential homemaking activities such as meal preparation if the adult not receiving care who resides in the home is unavailable due to employment. The department may provide shopping assistance only if at least one other activity is performed and no other shopping assistance is available through informal networks or other community providers.
- 7. Nonmedical transportation services may be provided to clients who are unable to provide their own transportation and need transportation to access essential community services such as grocery stores or pharmacies. "Nonmedical transportation services" are transportation services not related to the receipt of medical care.
- 8. The department may provide respite care services to a client in the client's home, in the provider's home, in a nursing home, in a swing bed facility, in a basic care facility, or in a hospital, if:
 - a. The client has a full-time primary caregiver;
 - b. The client needs a qualified caregiver or it would be inappropriate to use an unqualified caregiver in the absence of the primary caregiver;
 - c. The primary caregiver's need for the relief is intermittent or occasional; and
 - d. The primary caregiver's need for relief is not due to the primary caregiver's employment or attendance at school as a part-time or full-time student.
- 9. The department may provide other services as the department determines appropriate.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-08. Residency. For purposes of this chapter:

1. An individual is a resident of this state if the individual is not living in an out of state institution and is living in this state:
 - a. With intent to remain in this state permanently or for an indefinite period; or
 - b. Without intent if the individual is incapable of stating intent.
2. An individual who is a resident of this state is a resident of the county in which the individual is a resident for purposes of receipt of benefits under North Dakota Century Code chapter 50-01.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-09. Denial, reduction, and termination of services - Appeal.

1. The department's designee shall inform a person who is determined to be ineligible for covered services or who becomes ineligible while receiving services in writing of the denial, termination, or reduction, the reasons for the denial, termination, or reduction, the right to appeal, and the appeal process as provided in chapter 75-01-03.
2. A client must receive ten calendar days' written notice before termination of services occurs. The ten-day notice is not required if:
 - a. The client enters a basic care facility or a nursing facility;
 - b. The termination is due to changes in federal or state law;
 - c. The client requests termination of services;
 - d. The client moves from the service area; or
 - e. The client is deceased.
3. An applicant denied services or a client terminated from services should be given an appropriate referral to other public or private service providers and should be assisted in finding other resources.
4. For denial or termination of services, a review of the decision by the county social service board director or the director's designee may be requested. A request for review does not change the time within which the request for an appeal hearing must be filed under chapter 75-01-03.
5. The department shall deny or terminate Ex-SPED program services when service to the client presents an immediate threat to the health or safety of the client, the provider of services, or others or when services that are available are not adequate to prevent a threat to the health or safety of the client, the provider of services, or others. Examples of health and safety threats include: physical abuse of the provider by the client, client self neglect, an unsafe living environment for the client, or contraindicated practices, like smoking while using oxygen.
6. Errors made by public officials and delays caused by the actions of public officials do not create eligibility and may not form the basis for the award of any benefit to an adversely affected applicant or recipient who would not otherwise be eligible to receive that benefit.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-10. Payment under the Ex-SPED program.

1. Payment for Ex-SPED services may only be made to an enrolled qualified service provider who meets the standards described in 75-03-23.
2. The department shall establish provider rates for home and community-based services in accordance with a procedure that factors in:
 - a. Whether a provider is an individual or an agency; and
 - b. The range of rates submitted by various providers.
3. The rate for a specific qualified service provider is established at the time the provider agreement is signed.
4. The department shall grant a request for a rate decrease when the department receives a written request for the decrease from the qualified service provider.
5. The department shall grant in full or in part, or shall deny, a request for a rate increase, when the department receives a written request for the rate increase from the qualified service provider.
6. The department shall determine the maximum amount allowable per client each month for a specific service.
7. The department shall establish the aggregate maximum amount allowable per client each month for all services.
8. The department may grant approval to exceed the monthly service program maximum for a specific client who is only receiving Ex-SPED funds if:
 - a. The client has a special or unique circumstance; and
 - b. The need for additional service program funds will not initially exceed three months. Under emergency conditions, the department may grant a one-time extension not to exceed an additional three months.
9. The department's designee shall notify the client of the department's determination regarding the request to exceed the monthly service program maximum. If the department denies the request to exceed the monthly aggregate maximum, the department's designee shall inform the client in writing of the reason for the denial, the client's right to appeal, and the appeal process, as provided in chapter 75-01-03.
10. The Department will grant approval to exceed the monthly program maximum or service maximum for individuals receiving Ex-SPED funds whose service units exceed the program caps as a result of the qualified service provider rate increase. This extension is limited to individuals who were receiving services prior to July 1, 2007.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-11. Department to recover funds upon establishment of noncompliance. A qualified service provider shall not submit a claim for payment or receive service payments for services that have not been delivered in accord with department policies and procedures. The department shall recover all payments received by a qualified service provider who fails to deliver services in accord with the provider agreement or department policy and procedure.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

75-03-24-12. Administration. The department's designee of the county where the applicant or recipient is living must be responsible for the administration of the program with respect to that applicant or recipient.

History: Effective April 1, 2012.

General Authority: 50-24.7-02

Law Implemented: 50-24.7

Jack Dalrymple, Governor
Carol K. Olson, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTER 75-02-10
BASIC CARE ASSISTANCE PROGRAM AND
CREATION OF N.D. ADMIN. CODE CHAPTER 75-03-24
EXPANDED SERVICE PAYMENTS TO THE ELDERLY AND DISABLED**

The North Dakota Department of Human Services (the Department) held a public hearing on Thursday, December 29, 2011, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code chapter 75-02-10, Basic Care Assistance Program and creation of N.D. Administrative Code chapter 75-03-24, Expanded Service Payments to the Elderly and Disabled (Ex-SPED).

Written comments on these proposed amendments could be offered through 5:00 p.m. on Monday, January 9, 2012.

No one attending the public hearing provided comments. Three written comments were received within the comment period. The commentators were:

1. Doug Wegh, Adult Services Committee
2. Shelly Peterson, ND Long Term Care Association, 1900 N 11th St, Bismarck, ND 58501
3. David Boeck, Protection & Advocacy, 400 E Broadway, Ste 409, Bismarck, ND 58501

SUMMARY OF COMMENTS

Comment: 75-02-10 – In the past year, a number of individuals have been denied basic care services because their monthly income exceeds a facility's specific "personal care rate." In this situation, the individual's options are very limited and, in most instances, they are admitted to a nursing facility at the PA-1 rate (or comparable RUGS IV rate). The other option is to find a basic care facility that has a higher "personal care rate" that falls below the person's monthly income. This often would require a move to another city, if such facility exists. This policy does not promote keeping a person at the most independent level of care, as well as at the most cost effective level of care. It encourages institutionalization. The following example provided by one facility was enclosed. Five individuals have been affected by this issue between May of 2011 and December of 2011.

1. Three residents had to move out of a facility and into the nursing home because their monthly income exceeded the facility's personal care rate. All three of these residents would have been able to remain at the facility and receive an appropriate level of care at Basic Care.
2. One resident was disqualified from his Medicaid due to the same reason; however, he is paying privately at this time (family is assisting so he can remain at the facility).

3. One person was denied admission due to her monthly income exceeding the facilities personal care rate.

All of the residents who moved to the nursing home were placed at a PA-1 rate until their MDS came back. It is anticipated all residents will remain at this lowest classification.

If they all remain at the PA-1 rate which would be "best care" scenario; they would be at a daily rate of \$178.39 versus the facilities daily rate of \$78.86. At the minimum, it is difference of \$99.53 a day per individual. This is a difference of \$3,027 per month for each individual. Beside the greater expense to the Medicaid program is the fact each person is not living at the most independent level of care.

Please amend the rules and use state general funds in these types of situations so individuals have the option to remain at the most appropriate, independent level of care.

Response: The suggested change does not address the substance of the proposed change; rather it sets forth a request that would require a statutory change and appropriation. No change is needed.

Comment: 75-03-24-02(4) – In 2011, the SSI monthly cash benefit was only 74% of the federal poverty guidelines for a family of one. Ex-SPED should use 100% of the federal poverty guidelines as the financial eligibility criterion. Any less is too low.

Response: The financial eligibility criteria for Ex-SPED is defined in N.D.C.C. chapter 50-24.7. Any change to the financial eligibility criteria for Ex-SPED would require a statutory change. No change is needed.

Comment: 75-03-24-06 – This provision does not explicitly address a key component to independent living namely – assistive technology otherwise known as durable medical equipment. Assistive technology (AT) enables people with disabilities to accomplish a task that would otherwise not be possible. AT can aid in activities of daily living and provide greater independence, including helping them remain in their own homes. We encourage the Department to amend the proposed rules to require that AT be made a part of the functional assessment process and be included in the assessment tool/form.

Response: Gathering information about a recipients' adaptive equipment or environmental modification needs, or both, is currently part of the Home and Community Based Services comprehensive assessment. The Department will amend 75-03-24-06 to include adaptive equipment or environmental modification, or both, to explicitly address this component of the functional assessment process.

Comment: 75-03-24-07(3) – The chore services listed under this provision may not be broad enough. A consumer's inability to perform locally mandated lawn care might compromise the consumer's chances of remaining at home. If the city takes enforcement action regarding lawn care, the consumer might eventually lose personal housing.

Response: The Department does not consider the provision of lawn care to be a necessary service to assure participant's health and safety. In addition, providing lawn care to Ex-SPED

recipients would increase the costs of providing chore services and may require legislative action to increase appropriations. No change is needed.

Comment: 75-03-24-07(4)(d) – The phrase “limited to labor and materials for installing safety rails” could be easily misinterpreted to exclude all environmental modifications to consumer homes except for safety rails. Reversing the order of this phrase should resolve the problem, e.g., “when providing safety rails, the department shall only be responsible for labor and materials.” This might prevent someone from concluding that the only environmental modification available is safety rails.

Response: The Department does not recommend a change in this provision as environmental modification under Ex-SPED is limited to labor and materials for installing safety rails.

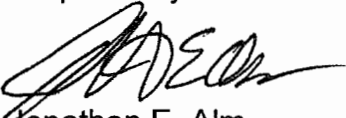
Comment: 75-03-24-09-Denial, Reduction, and Termination of Services, why isn't death of a client listed as one of the situations when a 10 day notice isn't needed? Some case managers have written families, etc. closing a client's file when someone dies.

Response: The Department has revised 75-03-24-09(2) to include death as a reason that case managers would not need to provide a denial, reduction or termination of services notice to a recipient.

Comment: 75-03-24-09(3) – A client terminated from the Ex-SPED program should be entitled to planning for services after termination; this would be akin to discharge planning. It would ensure that the client receives appropriate care and services in the least restrictive environment. Without discharge planning, a consumer terminated from services might end up in an unnecessarily more restrictive placement such as a nursing home.

Response: The Department does not recommend a change in this provision as appropriate referrals provided to applicants and recipients who are denied or terminated from Ex-SPED services currently include referrals to other non- institutional service providers. Therefore, the requirements included in this comment are already addressed under 75-03-24-09(3). No change is needed.

Prepared by:



Jonathan E. Alm
Legal Advisory Unit
N.D. Dept. of Human Services

In Consultation with: Nancy Nikolas Maier, Medical Services and Carol Cartledge, Public Assistance

January 17, 2012

Cc: Nancy Nikolas Maier, Medical Services
Carol Cartledge, Public Assistance

TO: Julie Leer, Legal Advisory Unit

FROM: Carol Cartledge, Director of Economic Assistance Policy/Public Assistance

SUBJECT: Regulatory Analysis to Proposed Amendments to N.D. Administrative Code Chapter 75-02-10 Basic Care Assistance Program

DATE: July 6, 2011

The purpose of this regulatory analysis is to fulfill the requirements N.D.C.C. 28-32-08. The impact of the proposed rule changes on the regulated community is anticipated not to exceed \$50,000.

Purpose

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed new/amendments to N.D. Admin. Code Chapter 75-02-10 Basic Care Assistance Program. Federal law does not mandate the proposed rules.

Classes of Persons who will Probably be affected by the Proposed Amendments

The Individuals that may be impacted are those residing in a licensed basic care facility.

Probable Impact

It is anticipated there will not be an impact because the changes are clarifications and to remove expanded service payments from this chapter based on change to Chapter 50-24.5 of North Dakota Century Code. Expanded service payments will create a chapter specific to the program.

Probable Costs of Implementation and Enforcement and Anticipated Effect on State Revenues

Since the changes are clarifications and separating out expended service payments, there will not be implementation costs or an effect on state revenues.

Alternative Methods that were Considered

No alternative methods considered.

Conclusion

The changes are necessary to be in compliance with changes to Chapter 50-24.5 of North Dakota Century Code. It is anticipated fiscal impact and impact to applicants or recipients will be minimal to none.

MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Nancy Nikolas Maier, Program Administrator, Medical Services *nm*

RE: Regulatory Analysis of Proposed New Chapter North Dakota
Administrative Code 75-03-24, Expanded Service Payments for the
Elderly and Disabled (EX-SPED)

DATE: July 13, 2011

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed creation of new North Dakota Administrative Code Article 75-03-24. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed creation of new N.D. Admin. Code chapter 75-03-24. Federal law does not mandate the proposed rules.

Classes of Persons Who Will be Affected

The classes of person who will most likely be affected by these rules are:

Individuals that receive services under Expanded Service Payments for the Elderly and Disabled program

Probable Impact

The proposed creation of this chapter may impact the regulated community as follows:

- Assist individuals in understanding that Ex-SPED is a separate service and not affiliated with the Basic Care Room and Board payment program (BCAP).
- More clearly define the services that are available under Ex-SPED, the Department's powers and duties, the Counties' powers and duties, and the applicants or guardian's duty to establish eligibility.

Probable Cost of Implementation

- There is no anticipated cost for implementing this new chapter because it does not change the expanded service payments for the elderly and disabled (Ex-SPED) program it only separates it from Basic Care.

Consideration of Alternative Methods

A consideration of alternate methods was not considered as the creation of this chapter is necessary to comply with 2011 SB 2077.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Carol Cartledge, Director of Economic Assistance Policy/Public Assistance

DATE: July 6, 2011

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed [New/ Amendments to] N.D. Admin. Code chapter 75-02-10.

The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This regulatory analysis pertains to proposed amendments to N.D. Admin. Code Chapter 75-02-10. The proposed rules are not mandated by federal law.

Consistent with public health, safety, and welfare, the Department has considered using regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the rules' impact on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

The changes to N.D. Admin. Code Chapter 75-02-10 is based on changes to North Dakota Century Code 50-24.5. The compliance and reporting requirements of individuals residing in a licensed basic care facility will not be affected by the changes to this service chapter.

2. Establishment of Less Stringent Schedules or Deadlines for Compliance or Reporting Requirements for Small Entities

It is anticipated that small entities will not be affected by the rule change.

3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

It is anticipated that small entities will not be affected by the rule change.

4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rules

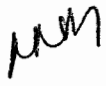
It is anticipated that small entities will not be affected by the rule change.

5. Exemption of Small Entities From All or Any Part of the Requirements Contained in the Proposed Rules

It is anticipated that small entities will not be affected by the rule change.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Nancy Nikolas Maier, Program Administrator, Medical Services 

DATE: July 13, 2011

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Creation of N.D. Admin. Code chapter 75-03-24.

The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This regulatory analysis pertains to proposed new N.D. Admin. Code chapter 75-03-24. Federal law does not mandate the proposed rules.

Consistent with public health, safety, and welfare, the Department has considered using regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the rules' impact on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

Small entities affected by the proposed rule include small political subdivisions consisting of County Social Service Boards of counties with populations of less than five thousand, small businesses and small organizations enrolled as Qualified Service Providers.

Like all other County Social Service Boards in North Dakota, County Social Service Boards of counties with populations with less than five thousand are responsible for locally administering the expanded service payments for the elderly and disabled (EX-SPED) program. The County Social Service Boards must assist the North Dakota Department of Human Services to meet any compliance and reporting requirements imposed by state law. In addition, all Qualified Service Providers are required to comply with the service standards set forth in N.D.A.C. 75-03-23-07. For these reasons, establishment of less stringent compliance or reporting requirements for these small entities was not considered.

2. Establishment of Less Stringent Schedules or Deadlines for Compliance or Reporting Requirements for Small Entities

The proposed rules will not alter in any material way any required schedules or deadlines for compliance or reporting requirement of County Social Service Boards or Qualified Service Providers. For this reason, the establishment of less

stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

The proposed rules will not alter in any material way any required compliance or reporting requirements of County Social Service Boards or Qualified Service Providers. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rules

The proposed rules do not impose any design standards or impose any additional operational standards or operational standards for County Social Service Boards or Qualified Service Providers. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

5. Exemption of Small Entities From All or Any Part of the Requirements Contained in the Proposed Rules

The requirements of the proposed rules are imposed on County Social Service Boards and small entities enrolled as Qualified Service Providers. The proposed rule will not alter in any material way any required compliance or reporting requirement for these small entities. Therefore, an exemption of small entities from all or part of the requirements in the proposed rule was not considered.

M E M O R A N D U M

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Carol Cartledge, Director of Economic Assistance Policy/Public Assistance

DATE: July 6, 2011

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to] N.D. Admin. Code chapter 75-02-10 Basic Care Assistance Program.

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code chapter 75-02-10 Basic Care Assistance Program. The proposed rules would not have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules Basic Care facilities

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: No administrative or other costs are required by the small entities for compliance with the proposed rules.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: There will not be probable cost to private persons or consumers for the proposed rules.

The probable benefit to private persons and consumers who are affected by the proposed rule: No anticipated benefits to private persons or consumers by the proposed rules.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: No effects on state revenue expected because of the proposed rules.

5. Alternative Methods

The Department considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. Because small entities will not experience administrative costs or other costs and no probable effect on State Revenue, exploring alternative methods was not necessary.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Nancy Nikolas Maier, Program Administrator, Medical Services *nm*

DATE: July 13, 2011

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed creation of new N.D. Admin. Code chapter 75-03-24.

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed creation of new N.D. Admin. Code chapter 75-03-24. The proposed rules are mandated by 2011 Senate Bill 2077. The proposed rules should not have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules

Small entities affected by these proposed rules include small political subdivisions consisting of the County Social Service Boards of counties with populations with less than five thousand, small businesses and small organizations enrolled as Qualified Service Providers.

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: No additional administrative costs will be incurred by County Social Service Boards or small business and organizations enrolled as Qualified Service Providers because of the proposed rules.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: There will not be probable cost to private persons or consumers for the proposed rules.

The probable benefit to private persons and consumers who are affected by the proposed rule: The anticipated benefit is that expanded service payments for the elderly and disabled services will remain unchanged.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: No effects on state revenue expected because of the proposed rules.

5. Alternative Methods

The Department considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. Because small entities will not experience administrative costs or other costs and no probable effect on State Revenue, exploring alternative methods was not necessary.

Jack Dalrymple, Governor
Carol K. Olson, Executive Director


TAKINGS ASSESSMENT

concerning proposed amendments to N.D. Admin. Code chapter
75-02-10 and creation of N.D. Admin. Code chapter 75-03-24.

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.
2. The purpose of this proposed rule is clearly and specifically identified in the public notice of proposed rulemaking which is by reference incorporated in this assessment.
3. The reasons this proposed rule is necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.
4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than \$0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than \$0.
5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.
6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

Dated this 18th day of November, 2011.

by: 
N.D. Dept. of Human Services