

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

N.D. Admin. Code Chapter 75-03-17, Psychiatric Residential Treatment Facilities (Pages 232-263))))))	<u>REPORT OF THE</u> <u>DEPT. OF HUMAN SERVICES</u> March 12, 2008
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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 75-03-17 arose out of 2007 Senate Bill No. 2130, relating to psychiatric residential treatment facilities for children.

2. These rules are related to changes in Title 42, Code of Federal Regulations, part 483.350 et seq. which defines the requirements for use of restraints in psychiatric residential treatment facilities for children; and Title 42, Code of Federal Regulations, part 441.150 et seq. which defines the requirements for inpatient psychiatric services for individuals under age 21 in psychiatric facilities or programs.
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 boards, 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.

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4. Comments were received at the public hearing held in Bismarck on December 7, 2007. The record was held open until December 20, 2007, to allow written comments to be submitted. A summary of comments 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 \$1946.96.
 6. The rules were amended to comply with 2007 Senate Bill No. 2130, relating to psychiatric residential treatment facilities for children. In addition to changing references from "residential treatment center for children" or "center" to "psychiatric residential treatment

facility" or "facility" and from "resident" to "child" throughout the chapter, the following specific changes were made:

Section 75-03-17-01. This section contains definitions for N.D.A.C. chapter 75-03-17 and is amended to delete the definitions of "center", "program plan", and "residential treatment centers for children"; and to define "child", "initial license", "psychiatric residential treatment facility for children", and "special treatment procedures".

Section 75-03-17-02. This section contains the procedures for licensing a psychiatric residential treatment facility for children.

It is amended to remove chemotherapy from and add psychopharmacology to treatment modalities offered by a facility, to add additional requirements for a licensing application, and to add conditions under which a provisional license may be issued, under which a license may be denied or revoked, and to identify the process for appeal.

Section 75-03-17-03. This section is amended to identify the responsibility of an applicant to provide information on criminal convictions of the owner, operator, or employees, to require a record of medical care given at the facility to be part of a child's case record, and to change the term "vacations" to "therapeutic leave".

Section 75-03-17-04. This section is amended to clarify requirements for a child to be admitted into a psychiatric

residential treatment facility.

Section 75-03-17-05. This section is amended to clarify the responsibilities of the facility in the diagnosis and treatment of a child at the facility.

Section 75-03-17-06. This section details the conditions under which special treatment procedures may be used; requires that each facility have specific training in the use of special treatment procedures; and establishes reporting requirements a facility must follow if serious injury or death occurs at a facility.

Section 75-03-17-07. This section is amended to require documentation of the return or destruction of a child's medication upon discharge and to require review of a child's psychotropic medication regime upon a child's admission, when a new psychotropic medication is prescribed, or when a psychotropic medication is discontinued.

Section 75-03-17-08. This section is amended to clarify that if a child is admitted to a facility who has not had a dental examination within the 12 months prior to admission, a dental examination must be scheduled within 90 days of admission.

Section 75-03-17-09. This section is amended to require a facility to provide safety instructions to children on play equipment. Additionally, it identifies the types of services that must be available to children in the facility and requires that

facilities provide children with opportunities to attend spiritual ceremonies as the children's beliefs may require.

Section 75-03-17-10. This section is amended to require annual training for facility staff, to remove provisions requiring religious education, and to clarify discipline authority.

Section 75-03-17-11. This section is amended to change the term "center" to "facility" and to change the term "resident" to "child".

Section 75-03-17-12. This section is amended to require a facility to coordinate facility services and related community services with partial discharge plans.

Section 75-03-17-13. This section is amended to change the term "center" to "facility" and to change the term "resident" to "child".

Section 75-03-17-14. This section is amended to change the term "center" to "facility" and to change the term "resident" to "child".

Section 75-03-17-15. This section is amended to clarify the presence of night staff at night.

Section 75-03-17-16. This section is amended to add reference to federal law relative to the prohibition of sexual contact

between staff and children, and to clarify the requirements for background checks and training of employees.

Section 75-03-17-16.1. This section is amended to change the term "center" to "facility" and to change the term "resident" to "child".

Section 75-03-17-17. This section is amended to clarify requirements for a facility program director.

Section 75-03-17-18. This section is amended to clarify the requirements for the premises of a facility.

Section 75-03-17-19. This section is amended to change the term "center" to "facility".

Section 75-03-17-20. This section clarifies the conditions under which license refusal or revocation may occur.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendments are not expected to have an impact on the regulated community in excess of \$50,000. A regulatory analysis was prepared and is attached to this report.
8. A small entity regulatory analysis and small entity economic impact statement were prepared and are attached to this report.

9. A constitutional takings assessment was prepared and is attached to this report.
10. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Julie Leer
Legal Advisory Unit
North Dakota Department of Human Services
March 12, 2008

**SUMMARY OF COMMENTS RECEIVED IN REGARD TO PROPOSED
AMENDMENTS TO N.D. ADMIN. CODE CHAPTER 75-03-17, RESIDENTIAL
TREATMENT CENTERS FOR CHILDREN**

A public hearing was held on December 7, 2007, concerning proposed amendments to North Dakota Administrative Code Chapter 75-03-17, Residential Treatment Centers for Children. Written comments on these proposed amendments could be offered through 5:00 p.m. on December 20, 2007.

One written comment was received within the comment period. Two commentators made comments at the public hearing. Commentors were:

1. Susan Gerenz, Director, Pride Manchester House, PO Box 4086, Bismarck, ND 58502.
2. John Ford, 6531 25th Ave. NE, Rugby, ND 58368.

SUMMARY OF COMMENTS:

Comment: One commentator noted in § 75-03-17-16(11)(c) and (g), that the requirements for all direct care staff not currently under orientation status should not be required to have completed therapeutic crisis intervention and crisis prevention intervention as they basically have the same curriculum.

Response: Based on this comment § 75-03-17-16(11)(c) and (g) is amended as follows:

- ~~10.~~ 11. A center facility shall maintain an individual personnel file on each employee. The personnel file must include:
- a. The application for employment, including a record of previous employment, and the applicant's answer to the question, "Have you been convicted of a crime?";
 - b. Annual performance evaluations;
 - c. Annual staff development and training records, including first-aid training, cardiopulmonary resuscitation training, universal infectious disease infection control precautions training, and therapeutic crisis intervention or crisis prevention and intervention training records. "Record" means documentation, including with respect to development or training presentations the:
 - (1) Name of presenter;
 - (2) Date of presentation;

- (3) Length of presentation; and
- (4) Topic of presentation;
- d. Results of background checks for criminal conviction records, motor vehicle violations, and child abuse or neglect records;
- e. Any other evaluation or background check deemed necessary by the administrator of the center facility; and
- f. Documentation of the existence of any license or qualification for position or the tasks assigned to the employee; and
- g. All direct care staff not currently under orientation status must have satisfactorily completed first aid, therapeutic crisis intervention or crisis prevention intervention, universal infection control precautions, and cardiopulmonary resuscitation, and have on file at the facility a certificate of completion.

Comment: One commentor noted in § 75-03-17-01(2) that the proposed change would give the department broad authority over a person who, by legal definition, is an adult. The commentor also stated that the change would affect the safety of the actual children participating in the residential treatment centers.

Response: NDCC Chapter 25-03.2 Residential Treatment Centers for Children, defines child and children as "a person or persons under the age of twenty-one." NDCC § 25-03.2-01(1). Therefore, based on § 25-03.2-01(1) the change suggested by this commentor was not implemented.

Comment: One commentor noted that the proposed addition of § 75-03-17-01(13)(a) does not go as far as it needs to ensure the safety of children when they are prescribed medication. The commentor suggests the department eliminate the use of prescription medication that can cause permanent serious illness or physical injury to children.

Response: The change suggested by this commentor was not implemented. The proposed change to § 75-03-17-01(13)(a) is to reflect the federal definition of a "drug used as a restraint" in accordance with Title 42 CFR § 483.352. The proposed change does not address the administration of a drug used as a restraint.

Comment: One commentor noted that sedation under § 75-03-17-01(13)(a) should be only a last resort method for controlling a child's behavior.

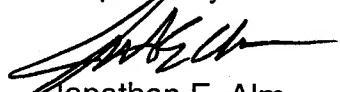
Response: The change suggested by this commentor was not implemented. The proposed rule change to § 75-03-17-01(13)(a) is to reflect the federal

definition of a "drug used as a restraint" in accordance with Title 42 CFR § 483.352. The proposed change does not address the administration of a drug used as a restraint or sedation. The proposed change does not address the steps a psychiatric residential treatment facility for children must take when attempting to control a child's behavior.

Comment: One commentor noted that the proposed removal of § 75-03-17-10(2) and the addition of § 75-03-17-09(9) violates the separation of church and state doctrine and the United States Constitution in regards to the freedom of religion by the department supporting a particular faith or doctrine.

Response: The change suggested by this commentor was not implemented. The proposed changes to §§ 75-03-17-10(2) and 75-03-17-09(9) neither affects a resident's freedom of religion nor applies to the separation of church and state doctrine as suggested by the commentor. The proposed changes were made in accordance with the NDDHS Chapter Manual 641, Wraparound Case Management. The strengths-based approach and philosophy to serving the unique and individual needs of the resident and family includes a comprehensive strengths discovery. The strengths discovery assesses and addresses the 10 life domains of the resident and family, which includes discussion of the life domain of "spirituality". The overall well-being of residents is part of their general health and "spirituality" is best defined under § 75-03-17-09(9) rather than §75-03-17-10(2).

Prepared by:



Jonathan E. Alm
Legal Advisory Unit

In Consultation with:

Carla Kessel, Department of Human Services
Joan Ehrhardt, Department of Human Services

January 28, 2008

Cc: Carla Kessel
Joan Ehrhardt
John Ford
Susan M. Gerenz
Dawn Pearson

in Hoeven, Governor
of K. Olson, Executive Director

MEMO

TO: Julie Leer, Legal Advisory Unit

FROM: ✓ Carla Kessel, Administrator- Children's Mental Health Services Programs

Joan Joan Ehrhardt, Administrator- Certificate of Need for Under 21

RE: Regulatory Analysis of Proposed North Dakota Administrative Code Chapter 75-03-17

DATE:

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to the proposed rule change to North Dakota Administrative Code Chapter 75-03-17. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The purpose of these rules is to clarify and revise definitions and rules relating to psychiatric residential treatment facilities (PRTFs) in accordance with federal and state standards and laws [42. U. S. C. 139d Pub. L. 89-97; 79 Stat. 351 and part 441 and 483 of the Code of Federal Regulation & NDCC 25-3.2].

Classes of Persons Who Will be Affected

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

1. Children under age 21 who reside in a North Dakota PRTFs, with severe emotional disturbances and their families; and
2. 6 PRTF operators in the state of North Dakota

PRTFs must be in accordance with federal and state standards and laws 42. U. S. C. 139d Pub. L. 89-97; 79 Stat. 351 and part 441 and 483 of the Code of Federal Regulation & NDCC 25-3.2. PRTFs will have another oversight agency (accreditation body) monitoring compliance of standards and practices.

Probable Impact

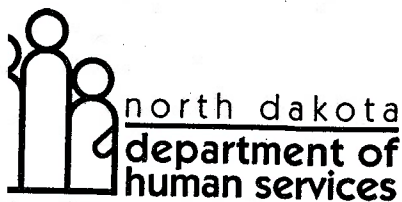
The proposed rule is not anticipated to have an adverse economic impact on small entities.

Probable Cost of Implementation

None, the amendments become part of existing rules on rate setting and there are no additional costs for implementing the changes.

Consideration of Alternative Methods

The definition and clarification of PRTFs is necessary to implement state and federal laws and the Departments practices and policies for licensure. There were no other alternative methods to consider to implementing the proposed amendments to the rule.



in Hoeven, Governor
of K. Olson, Executive Director

MEMORANDUM

TO: Julie Leer, Legal Advisory Unit

FROM: *Carla* Carla Kessel, Administrator- Children's Mental Health Services Programs

Joan Joan Ehrhardt, Administrator- Certificate of Need, Under 21

DATE: June 26, 2007

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-03-17

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/amendments to] N.D. Admin. Code chapter 75-03-17. The proposed rule is mandated by federal law under 42 U.S.C. 139d [Pub. L. 89-97; 79 Stat. 351 and part 441 and 483 of the Code of Federal Regulation].

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 only small entities affected by this proposed amendment are the psychiatric residential treatment facilities (PRTFs) in North Dakota. North Dakota has 6 PRTFs that serve children with severe emotional disturbances. Center for Medicare and Medicaid (CMS) mandates that PRTFs be accredited by a nationally recognized accreditation body and North Dakota Century Code (NDCC 25-3.2) requires licensure. The proposed amendment will not alter in any material way any required compliance or reporting requirement of PRTFs. For these reason, 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 amendment will not alter in any material way any required schedules or deadlines for compliance or reporting requirements of PRTFs. For this reason, and because federal and state law requires the Medicaid program to be uniformly applied throughout the state, 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

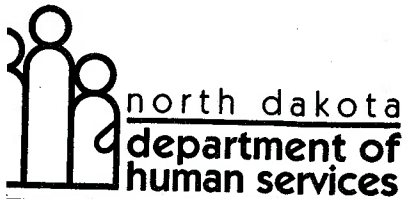
The proposed amendment will not alter in any material way any required consolidation or simplification of compliance or reporting requirements of PRTFs. For this reason, and because federal and state law requires the Medicaid program to be uniformly applied throughout the state, neither consolidation nor simplification of compliance or reporting requirements for these small entities was considered.

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

The PRTFs are responsible to comply and maintain accreditation standards as well as operational standards imposed by federal and state law. The proposed amendment does impose design standards and operational standards to be in compliance with accreditation standards and state and federal law. PRTFs must provide to children and adolescents, a total, twenty-four-hour, therapeutic environment integrating group living, educational services, and a clinical program based upon a comprehensive, interdisciplinary clinical assessment and an individualized treatment plan that meets the needs of the child and family. The services are available to children in need of and able to respond to active psychotherapeutic intervention and who cannot be effectively treated in their own family, in another home, or in a less restrictive setting.

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


The requirements of the proposed amendments are imposed on PRTFs. For this reason, and because federal law requires the Medicaid program to be uniformly applied throughout the state, the proposed rule does not exempt the facilities from all or any part of the requirements contained in the proposed rule.




in Hoeven, Governor
ol K. Olson, Executive Director

MEMORANDUM

TO: Julie Leer, Legal Advisory Unit

FROM:  Carla Kessel, Administrator- Children's Mental Health Services Programs

 Joan Ehrhardt, Administrator- Certificate of Need, Under 21

DATE: June 26, 2007

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-03-17

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 75-03-17. The proposed rule is mandated by federal law under 42. U. S. C. 139d Pub. L. 89-97; 79 Stat. 351 and part 441 and 483 of the Code of Federal Regulation. The proposed rule is not anticipated to have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rule are psychiatric residential treatment facilities (PRTFs). North Dakota has 6 PRTFs that serve children with severe emotional disturbances. Center for Medicare and Medicaid (CMS) mandates that PRTFs be accredited by a nationally recognized accreditation body and North Dakota Century Code (NDCC 25-3.2) requires licensure. Medicaid policies and practices must be uniformly applied throughout the state.

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be for PRTFs. The PRTFs may incur additional costs to meet staffing requirements and practices, however, those costs are reportable and recognized in their rate. The proposed amendments to the rule is not an unfounded mandate.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule are: affected families that are Medicaid eligible may be responsible for recipient liability for the placement of their child in a PRTF.

The probable benefit to private persons and consumers who are affected by the proposed rule: the accreditation of PRTFs ensures that children and families receive improved service delivery outcomes by developing, applying, and promoting accreditation standards. Accreditation envisions excellence in the delivery of human services globally, resulting in the well-being of individuals, families and communities.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: none, as the proposed amendment effects state expenditures, services provided to individuals in need of psychiatric residential treatment services.

5. Alternative Methods

There is no anticipated economic impact on the PRTFs. The Department was not able to consider whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules.

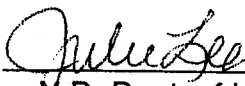
TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapter 75-03-17.

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 26th day of June, 2007.

by: 
N.D. Dept. of Human Services