

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

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| <b>N.D. Admin. Code Chapter<br/>75-02-01.3, Child Care Assistance<br/>(Pages 175-183)</b> | )<br>)<br>)<br>)<br>) | <b><u>REPORT OF THE</u><br/><u>DEPT. OF HUMAN SERVICES</u><br/><b>March 9, 2010</b></b> |
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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 75-02-01.3 are the result 2009 HB 1090 which created North Dakota Century Code Chapter 50-33 on child care assistance.
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 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.

4. A public hearing on the proposed rules was held in Bismarck on December 9, 2009. The record was held open until 5:00 p.m. on December 21, 2009 to allow written comments to be submitted. None were received. 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 \$1,905.44.
6. The proposed rules create a new chapter to the North Dakota Administrative Code relative to child care assistance. The following specific changes were made:
  - Chapter 75-02-01.3. Chapter 75-02-01.3 is created to set forth the administration of the Child Care Assistance Program and includes rules on decision and notice, closing of a case, available benefits, background check information, payments to providers, treatment of income, disregarded income, deduction for child support and spousal support, parental choice of caretaker or provider, intentional program violations and penalties, and reconsideration and appeal requests.
7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The proposed chapter is 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 9, 2010

## CHAPTER 75-02-01.3 CHILD CARE ASSISTANCE

| Section       |  |
|---------------|--|
| 75-02-01.3-01 | Definitions  |
| 75-02-01.3-02 | Decision and Notice  |
| 75-02-01.3-03 | Closing a Case   |
| 75-02-01.3-04 | Available Benefits   |
| 75-02-01.3-05 | Approved Relative Providers                                |
| 75-02-01.3-06 | Payments to Providers-Child Care Certificate               |
| 75-02-01.3-07 | Treatment of Income  |
| 75-02-01.3-08 | Disregarded Income   |
| 75-02-01.3-09 | Deduction for Child Support and Spousal Support            |
| 75-02-01.3-10 | Parental Choice  |
| 75-02-01.3-11 | Limitations  |
| 75-02-01.3-12 | Intentional Program Violation - Disqualification Penalties |
| 75-02-01.3-13 | Reconsideration and Appeal Requests                        |

**SECTION 1.** Chapter 75-02-01.3 is created as follows:

**75-02-01.3-01. Definitions.** The terms used in this chapter have the same meaning as in North Dakota Century Code chapter 50-33. In addition, as used in this chapter:

1. "Eligible child" means a child member of a child care assistance unit eligible for payment under the child care and development state plan.
2. "Intentional program violation" means an individual's intentional action or failure to act which consists of:
  - a. Making a false or misleading statement or misrepresenting, concealing, or withholding facts; or
  - b. Being convicted in federal or state court of having made a fraudulent statement or representation with respect to child care assistance;

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33

**75-02-01.3-02. Decision and notice.**

1. The county agency shall notify the applicant of any determination of eligibility or ineligibility.
2. The effective date a case is closed or suspended is the last calendar day of the month identified in the notice.



3. Errors made by public officials and delays caused by the actions of public officials do not create eligibility or additional benefits for an applicant or recipient who is adversely affected.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-02

**75-02-01.2-03. Closing a case.** A case must be closed when:

1. The parent or other caretaker is not participating in an allowable activity.
2. The child care assistance unit includes no eligible child.
3. The redetermination form:
  - a. Is not submitted timely;
  - b. Is incomplete so further eligibility cannot be determined; or
  - c. Indicates the family's income exceeds the upper income limit for the family size.
4. The family moves out of state.
5. For four consecutive months the payment share of the child care assistance program has been less than ten dollars and the child care assistance program has issued no payment.
6. The client requests that the case be closed.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-02

**75-02-01.3-04. Available benefits.**

1. The child care assistance program shall pay child care costs related to allowable activities of the eligible caretaker in a temporary assistance for needy families household or diversion assistance house-hold.
2. The child care assistance program shall pay a portion of child care costs related to allowable activities of the caretaker based on family size and countable income by applying a sliding fee schedule established by the department which is based on household size and income.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-02

**75-02-01.3-05. Approved relative providers background check information.**

Before approving an individual as an approved relative provider, the department shall review available public records .

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-02

**75-02-01.3-06. Payments to providers - Child care certificate.**

1. Unless a provider otherwise elects in a signed and dated writing, all payments of child care assistance must be made to a provider.
2. No payment may be made except on presentation of a claim in a form and manner required by the department for periods during which all parents or other caretakers in the child care assistance unit were engaged in an allowable activity.
3. No payment to a provider may be made at a rate in excess of that charged by the provider for services to individuals who do not receive child care assistance.
4. The department will issue to the eligible caretaker a child care certificate.
5. When a caretaker fails to pay the provider, the family is ineligible for child care assistance until:
  - a. The payment is made; or
  - b. The family reaches an agreement for payment with the provider and the family continues to comply with the payment agreement.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-06-06.1, 50-09-02, 50-33

**75-02-01.3-07. Treatment of income.**

1. A caretaker's earned income from wages or any other source must be considered received in the month it is normally received or available.
2. A caretaker's earned income from self-employment is computed by use of a federal income tax return, and must be prorated over a twelve-month period that coincides with either the calendar year or the fiscal year used on the caretaker's federal tax return. Depreciation and other costs of doing business that do not require outlays during the period covered by the tax return must be added to the net income.
3. A caretaker's earned income that is received on a contractual basis must be prorated over the period of the contract, regardless of when it is actually received.
4. Expenses necessarily incurred to maintain the source of the caretaker's unearned income may be deducted to determine countable unearned income. All countable unearned income must be considered received in the month in which it is normally received or normally available.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-02

**75-02-01.3-08. Disregarded income.** The following types of income must be disregarded in determining child care assistance eligibility and benefits.

1. Money payments made by the department in connection with foster care, subsidized guardianship, family subsidy, or the subsidized adoption program;



2. Temporary assistance for needy families benefits and support services payments;
3. Benefits received through the low income home energy assistance program;
4. County general assistance;
5. Bureau of Indian affairs general assistance;
6. Irregular cash gifts received by a caretaker;
7. A loan from any source that is subject to a written agreement requiring repayment by the caretaker;
8. A caretaker's income tax refunds and earned income credits;
9. A caretaker's educational loans, scholarships, grants, and awards, educational assistance provided under the Montgomery GI Bill, Public Law No.95-525 [98 Stat. 2553; 38 U.S.C. 101 et seq.], vocational rehabilitation payments, job service payments, and work study received by a caretaker who is an allowable post-secondary student in allowable vocational training.
10. Any fellowship or gift (or portion of a gift) used to pay the cost of a caretaker's tuition and fees at any educational institution;
11. Training funds received by a caretaker from vocational rehabilitation;
12. Training allowances of up to thirty dollars per week provided to a caretaker through a tribal native employment works program;
13. Needs-based payments, support services, and relocation expenses provided to a caretaker through programs established under the Workforce Investment Act of 1998 [Public Law 105-220 – Aug. 7, 1998; 112 Stat. 936];
14. Training stipends provided to a caretaker who is a victim of domestic violence by private, charitable organizations, for the caretaker to attend educational programs;
15. The first two thousand dollars per year of lease payments deposited in an individual Indian monies account for a caretaker;
16. Any income required by federal law to be disregarded;
17. Earned income of all children in the child care assistance unit;
18. A one-time bonus incentive payment, or commission to a caretaker;
19. Vendor payments or other payments made to a third party on behalf of the child care assistance unit;
20. Stipend payments to a caretaker that do not require work as a condition of receipt;
21. Nonrecurring lump sum payments to a caretaker;
22. Irregular income from sale of craft items and rummage sales;
23. Payments made by cafeteria or flex compensation plans to a caretaker;
24. Funds raised on behalf of the child care assistance unit, or any member of that unit, if the child care assistance unit does not have access to the funds;
25. Income from contracts for deed; and

26. A fifth paycheck received in a single month by an individual who is paid a weekly wage or a third paycheck received in a single month by an individual who is paid a bi-weekly wage.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-02

**75-02-01.3-09. Deduction for child support and spousal support.** Child support and court ordered spousal support, including arrearages, interest, and fees charged for income withholding, paid by or collected from a child care assistance unit member, whose income is counted in determining eligibility and benefit amounts, may be deducted from the child care assistance unit's income.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-02

**75-02-01.3-10. Parental choice - Contract between parent or caretaker and provider.** The parent or caretaker of each eligible child who receives or is offered child care services for which financial assistance is provided through the child care and development fund may choose the approved, registered, or licensed provider of services to that child. The department is not bound by or responsible for either party's compliance with the terms of any contract entered between a provider and a caretaker.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-01

**75-02-01.3-11. Limitations.**

1. No caretaker in child care assistance unit that includes two or more caretakers may be provided a benefit under this chapter for any time another caretaker is available, or is treated under this chapter as available, to meet the needs of the child for whom assistance is sought.
2. If other eligibility criteria is met, a caretaker who is attending school in a one or two year post-secondary vocational program that will lead to a certificate or a degree, high school or, a program leading to a general equivalence degree may be eligible to receive assistance under this program.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33

**75-02-01.3-12. Intentional program violation - Disqualification penalties.**

1. An individual who, on any basis, is found to have committed an intentional program violation by a state administrative disqualification proceeding or by a federal or state court is subject to the penalties provided in this



section. An individual who waives the individual's right to appear at an intentional program violation hearing is subject to the penalties provided in this section.

2. During any period of disqualification, if a disqualified individual:
  - a. Is a provider, the individual may not receive any child care assistance payment;
  - b. Is employed by a provider, that provider may not receive any child care assistance payment; and
  - c. Is a member of a child care assistance unit, that child care assistance unit is ineligible for child care assistance benefits.
3. The duration of the penalty described in this section is:
  - a. One year for the first offense;
  - b. Two years for the second offense; and
  - c. Permanently for the third offense.
4. Any period of disqualification must remain in effect, without possibility of an administrative stay, unless and until a court of appropriate jurisdiction subsequently reverses the finding upon which the penalty was based.
5. A disqualification penalty period must begin no later than the first day of the second month that follows the date of notice of imposition of the penalty.
6. The department shall issue a written notice informing the individual of the period of disqualification.
7. Overpayments may be recovered from:
  - a. The child care assistance unit that includes the disqualified individual;
  - b. Any child care assistance unit of which the disqualified individual subsequently becomes a member;
  - c. Any individual members of the child care assistance unit that included the disqualified individual;
  - d. The provider who was disqualified; and
  - e. The provider who employed the disqualified individual.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-02

#### **75-02-01.3-13. Reconsideration and appeal requests.**

1. An applicant or recipient of child care assistance aggrieved by a determination made under this chapter may request reconsideration of that decision by the department, and must request reconsideration before appealing that decision. A provider or member of a child care assistance unit aggrieved by a decision issued after a request for reconsideration must appeal in writing and include documentation of all of the following information:
  - a. A copy of the letter received from the department advising of the department's decision on the request for reconsideration;
  - b. A statement of disputed facts, if any;

- c. The authority in statute or rule upon which the applicant for or recipient of child care assistance relies for each disputed item; and
  - d. The name, address, and telephone number of the individual to whom the department will send all notices and information regarding the appeal.
- 2. A request for reconsideration must be made within thirty days after notice of a determination made under this chapter. An appeal must be filed within thirty days after the date of mailing of a decision issued pursuant to a request for reconsideration.
- 3. Chapter 75-01-03 governs an appeal made under this chapter.

**History:** Effective April 1, 2010.

**General Authority:** NDCC 50-33-02

**Law Implemented:** NDCC 50-33-02



John Hoeven, Governor  
Carol K. Olson, Executive Director

**SUMMARY OF COMMENTS RECEIVED  
REGARDING PROPOSED CREATION OF  
N.D. ADMIN. CODE CHAPTER 75-02-01.3  
CHILD CARE ASSISTANCE**

The North Dakota Department of Human Services (the Department) held a public hearing on December 9, 2009, in Bismarck, ND, concerning the proposed creation of N.D. Administrative Code chapter 75-02-01.3, Child Care Assistance.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 21, 2009.

No one attended or provided comments at the public hearing. No written comments were received within the comment period.

**SUMMARY OF COMMENTS**

No comments were received.

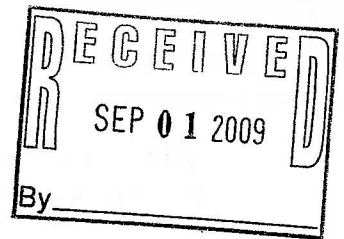
There will be no change to the proposed rule as no comments were received.

Prepared by:

Julie Leer, Director  
Legal Advisory Unit  
N.D. Dept. of Human Services

December 23, 2009

Cc: Carol Cartledge, EAP  
Linda Elstad, EAP



**TO:** Julie Leer, Legal Advisory Unit

**FROM:** Carol Cartledge, Director of Public Assistance

**SUBJECT:** Regulatory Analysis to Proposed Amendments to N.D.  
Administrative Code Chapter 75-02-01.3 Child Care Assistance.

**DATE:** August 27, 2009

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 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 75-02-01.3 Child Care Assistance. Federal law does not mandate the proposed rules.

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

1. Families receiving assistance with child care expenses.
2. Child care providers receiving assistance under the Child Care Assistance Program.

#### Probable Impact

House Bill 1090 enacted and created a new chapter to Title 50 of the North Dakota Century Code relating to child care assistance. The probable impact of implementing the rules will be the potential disqualification of receiving assistance based on fraudulently receiving assistance. A family or a child care provider may be disqualified from receiving assistance for one year for the first offense; two years for the second offense; and permanent for the third offense. The remainders of the rules being put into place are current policy and will not impact families or providers.

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

The probable cost of implementation and enforcement of the rules on State revenues may be a cost savings if a family or providers are found to have fraudulently received assistance under the program resulting in repayment of assistance received and ineligibility to receive assistance for a period of time.

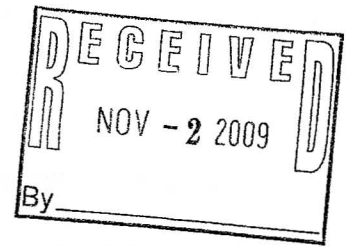
#### Alternative Methods that were Considered



Alternative methods were not considered as it is deemed rules are necessary to provide legal support to the program.

#### Conclusion

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 possible savings of State Revenue, exploring alternative methods was not necessary.



## MEMORANDUM

**TO:** Julie Leer, Director, Legal Advisory Unit

**FROM:** Carol Cartledge, Director of Public Assistance, Child Care Assistance Program

**DATE:** November 2, 2009

**SUBJECT:** Small Entity Regulatory Analysis Regarding Proposed New N.D. Admin. Code chapter 75-02-01.3

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 to N.D. Admin. Code chapter 75-02-01.3. 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

Establishment of less stringent compliance or reporting requirements for small entities was not taken into consideration as there will be no impact on small entities.

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

Since small entities will not be impacted, the establishment of less stringent schedules or deadlines for compliance or reporting requirements was not taken into consideration.

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

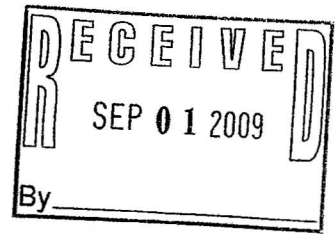
Consolidation or simplification of compliance or reporting requirements for small entities was not taken into consideration, as small entities will not be impacted by the proposed rules.

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

Performance standards were not established for small entities for replacement design or operational standards required in the proposed rule because it is not anticipated small entities will be impacted by the proposed rules.

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

Exemption of small entities from all or any part of the requirements in the proposed rule was not taken into consideration because it is anticipated small entities will not be impacted.



## MEMORANDUM

**TO:** Julie Leer, Director, Legal Advisory Unit

**FROM:** Carol Cartledge, Director of Public Assistance

**DATE:** August 27, 2009

**SUBJECT:** Small Entity Economic Impact Statement Regarding Proposed Amendments to] N.D. Admin. Code chapter 75-02-01.3 Child Care Assistance.

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 75-02-01.3 Child Care Assistance. The proposed rules would not have an adverse economic impact on small entities.

### 1. Small Entities Subject to the Proposed Rules

Small entities subject to the proposed rules are families receiving assistance under Child Care Assistance and child care providers receiving assistance under the program.

### 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: Potentially a savings of state revenue because of the fraud provisions include in the rules. All other policies and procedures identified in the rules are currently being utilized to support the program and no probable effect is anticipated on state revenues.

#### 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 or a potential savings of State Revenue, exploring alternative methods was not necessary.

John Hoeven, Governor  
Carol K. Olson, Executive Director

## TAKINGS ASSESSMENT

concerning proposed creation of N.D. Admin. Code chapter 75-02-01.3.

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 27<sup>th</sup> day of August, 2009.

by:   
N.D. Dept. of Human Services