

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

N.D. Admin. Code Chapter 75-02-02, Medical Services (Pages 111 – 124 and 125 – 127)))))	<u>REPORT OF THE</u> <u>DEPT. OF HUMAN SERVICES</u> December 10, 2009
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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 75-02-02 are the result of the provision in 2009 HB 1012 which added a third tier of personal care called expanded MSP-C with a maximum of 1200 units of service per month.
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 September 30, 2009. The record was held open until 5:00 p.m. on October 12, 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 \$1,940.64.
6. The rules were amended to add a third tier of personal care called expanded MSP-C with a maximum of 1200 units of service per month. The following specific changes were made:

Section 75-02-02-08. This section is amended to clarify, establish, and revise eligibility criteria for personal care services depending on a recipient's level of care.

Section 75-02-02-09.5. This section is amended to clarify, establish, and revise eligibility criteria for personal care services depending on a recipient's level of care. In addition, this section is amended to establish that personal care services may be terminated if services are not used within 60 days after the issuance of the authorization to provide personal care services,

and to allow the Department to deny or terminate personal care services when service to the client presents an immediate threat to the health or safety of the client, the provider, or others, or when services that are available are not adequate to prevent a threat to the health or safety of the client, provider, or others.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendments are 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
December 10, 2009

CHAPTER 75-02-02 MEDICAL SERVICES

SECTION 1. Subsection 2 of section 75-02-02-08 is amended as follows:

75-02-02-08. Amount, duration, and scope of medical assistance.

2. The following limitations apply to medical and remedial care and services covered or provided under the medical assistance program:
 - a. Coverage may not be extended and payment may not be made for diet remedies prescribed for eligible recipients.
 - b. Coverage may not be extended and payment may not be made for alcoholic beverages prescribed for eligible recipients.
 - c. Coverage may not be extended and payment may not be made for orthodontia prescribed for eligible recipients, except for orthodontia necessary to correct serious functional problems.
 - d. Coverage and payment for eye examinations and eyeglasses for eligible recipients are limited to examinations and eyeglass replacements necessitated because of visual impairment. Coverage and payment for eyeglass frames are available for a reasonable number of frames, and in a reasonable amount, not to exceed limits set by the department. No coverage exists, and no payment may be made, for eyeglass frames which exceed the limits.
 - e. Coverage and payment for home health care services and private duty nursing services are limited to a monthly amount determined by taking the monthly charge, to the medical assistance program, for the most intensive level of nursing care in the most expensive nursing facility in the state and subtracting therefrom the cost, in that month, of all medical and remedial services furnished to the recipient (except physician services and prescribed drugs). For the purposes of determining this limit, remedial services include home and community-based services, service payments to the elderly and disabled, homemaker and home health aide services, and rehabilitative services, regardless of the source of payment for such services. This limit may be exceeded, in unusual and complex cases, if the provider has submitted a prior treatment authorization request describing each medical and remedial service to be received by the recipient, stating the cost of that service, describing the medical necessity for the provision of the home health care services or private duty nursing services, and explaining why less costly alternative treatment does not afford necessary medical care, and has had the request approved.
 - f. Coverage may not be extended and payment may not be made for transportation services except as provided in sections 75-02-02-13.1 and 75-02-02-13.2.

- g. Coverage may not be extended and payment may not be made for any abortion except when necessary to save the life of the mother or when the pregnancy is the result of an act of rape or incest.
- h. Coverage may not be extended and payment may not be made for ambulance services that are not medically necessary, as determined by the department, and provided in response to a medical emergency.
- i. Coverage may not be extended and payment may not be made for emergency room services that are not medically necessary, as determined by the department under section 75-02-02-12, and provided in response to a medical emergency.
- j. Coverage may not be extended and payment may not be made for medically necessary chiropractic services exceeding twenty-four treatments for spinal manipulation services and eight radiologic examinations per year, per recipient, unless the provider requests and receives prior authorization from the department.
- k. Coverage and payment for personal care services ~~may~~:
 - (1) May not be made unless prior authorization is granted, and the recipient meets the criteria established in 75-02-02-09.5(1), and may not exceed one hundred twenty hours per month except when the recipient meets the medical necessity criteria for nursing facility level of care described in section 75-02-02-09 or intermediate care facility for the mentally retarded level of care, in which case, coverage and payment may not exceed two hundred forty hours per month
 - (2) May be approved for:
 - (a) Up to one hundred and twenty hours per month, or at a daily rate;
 - (b) Up to two hundred forty hours per month if the recipient meets the medical necessity criteria for nursing facility level of care described in section 75-02-02-09 or intermediate care facility for the mentally retarded level of care, or
 - (c) May be approved up to three hundred hours per month if the recipient is determined to be impaired in at least five of the activities of daily living of bathing, dressing, eating, incontinence, mobility, toileting, and transferring; meets the medical necessity criteria for nursing facility level of care described in section 75-02-02-09 or intermediate care facility for the mentally retarded level of care; and none of the three hundred hours approved for personal care services are allocated to the tasks of laundry, shopping, or housekeeping.

History: Amended effective September 1, 1978; September 2, 1980; February 1, 1981; November 1, 1983; May 1, 1986; November 1, 1986; November 1, 1987; January 1, 1991; July

1, 1993; January 1, 1994; January 1, 1996; July 1, 1996; January 1, 1997; May 1, 2000; amendments partially voided by the Administrative Rules Committee effective June 5, 2000; November 8, 2002; September 1, 2003; July 1, 2006; January 1, 2010.

General Authority: NDCC 50-24.1-04

Law Implemented: NDCC 50-24.1-04; 42 USC 1396n(b)(1); 42 CFR 431.53; 42 CFR 431.110; 42 CFR 435.1009; 42 CFR Part 440; 42 CFR Part 441, subparts A, B, D

SECTION 2. Section 75-02-02-09.5 is amended as follows:

75-02-02-09.5. Limitations on personal care services.

1. No payment for personal care services may be made unless an assessment of the recipient is made by the department and the recipient is determined to be impaired in at least one of the activities of daily living of bathing, dressing, eating, incontinence, mobility, toileting, and transferring or in at least three of the instrumental activities of daily living of medication assistance, laundry, housekeeping, and meal preparation.
2. No payment may be made for personal care services unless prior authorization has been granted by the department.
3. Payment for personal care services may only be made to an enrolled qualified service provider who meets the standards described in chapter 75-03-23 or to a basic care assistance provider that qualifies for a rate under chapter 75-02-07.1.
4. No payment may be made for personal care services provided in excess of the services, hours, or timeframe authorized by the department in the recipient's approved service plan.
5. Personal care services may not include skilled health care services performed by persons with professional training.
6. An inpatient or resident of a hospital, a nursing facility, an intermediate care facility for the mentally retarded, or an institution for mental disease may not receive personal care services.
7. Personal care services may not include home-delivered meals, services performed primarily as housekeeping tasks, transportation, social activities, or services or tasks not directly related to the needs of the recipient such as doing laundry for family members, cleaning of areas not occupied by the recipient, or shopping for items not used by the recipient.
8. Laundry, shopping, and housekeeping tasks when provided as personal care services must be incidental to the provision of other personal care tasks and cannot exceed thirty percent of the total time authorized for the provision of all personal care tasks.
9. No payment may be made for personal care services provided to a recipient by the recipient's spouse, parent of a minor child, or legal guardian.
10. No payment may be made for care needs of a recipient which are outside the scope of personal care services.
11. Authorized personal care services may ~~not exceed one hundred twenty hours per month except authorized personal care services may not exceed two hundred forty hours per month when a recipient has been~~

~~determined to meet nursing facility or intermediate care facility for the mentally retarded level of care criteria only be approved for:~~

- a. Up to one hundred and twenty hours per month, or at a daily rate;
 - b. Up to two hundred forty hours per month, or at a daily rate, if the recipient meets the medical necessity criteria for nursing facility level of care described in section 75-02-02-09 or intermediate care facility for the mentally retarded level of care; or
 - c. Up to three hundred hours per month if recipient is determined to be impaired in at least five of the activities of daily living of bathing, dressing, eating, incontinence, mobility, toileting, and transferring; meets the medical necessity criteria for nursing facility level of care described in section 75-02-02-09 or intermediate care facility for the mentally retarded level of care; and none of the three hundred hours approved for personal care services are allocated to the tasks of laundry, shopping, or housekeeping.
12. Personal care services may only be provided when the needs of the recipient exceed the abilities of the recipient's spouse or parent of a minor child to provide those services. Personal care services may not be substituted when a spouse or parent of a minor child refuses or chooses not to perform the service for a recipient. Personal care services may be provided during periods when a spouse or parent of a minor child is gainfully employed if the services cannot be delayed until the spouse or parent is able to perform them.
13. Personal care services may not be provided for tasks that are otherwise age appropriate or generally needed by an individual within the normal stages of development.
14. The authorization for personal care services may be terminated if the services are not used within 60 days, or if services lapse for at least 60 days, after the issuance of the authorization to provide personal care services.
15. The department may deny or terminate personal care 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.

History: Effective July 1, 2006; amended effective January 1, 2010.

General Authority: NDCC 50-24.1-18

Law Implemented: NDCC 50-24.1-18; 42 CFR Part 440.167



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John Hoeven, Governor
Carol K. Olson, Executive Director

SUMMARY OF COMMENTS RECEIVED REGARDING PROPOSED AMENDMENTS TO N.D. ADMIN. CODE CHAPTER 75-02-02 MEDICAL SERVICES

The North Dakota Department of Human Services (the Department) held a public hearing on September 30, 2009, in Bismarck, ND, concerning a proposed amendment to N.D. Administrative Code Chapter 75-02-02, Medical Services.

Written comments on these proposed amendments could be offered through 5:00 p.m. on October 12, 2009.

No one attending the public hearing provided comments. No written comments were received within the comment period.

SUMMARY OF COMMENTS

No comments were received.

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

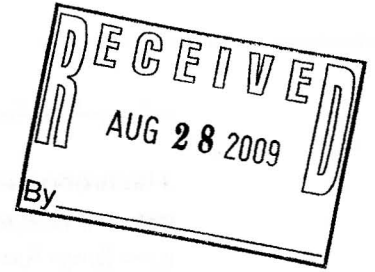
Prepared by:

A handwritten signature in cursive script that reads "Julie Leer".

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

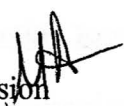
October 13, 2009

Cc: Tess Frohlich, Medical Services



MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Maggie Anderson, Director Medical Services Division 

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-02-02 Medical Services.

DATE: August 28, 2009

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed changes to North Dakota Administrative Code Article 75-02-02. These amendments are anticipated to have a fiscal impact on the regulated community in excess of \$2,763,446 for the 2009-2011 biennium for 18 months of service delivery.

Purpose

The purpose of these rules is to clarify, establish, or revise eligibility criteria for personal care services; add language regarding terminations of a prior authorization for services if the service is not used within 60 days, provide clarification regarding daily rates, and establish that the Department may deny or terminate personal care services when service to the client presents an immediate threat to the health or safety of the client, the provider, or others, or when services that are available are not adequate to prevent a threat to the health or safety of the client, provider, or others.

Classes of Persons Who Will be Affected

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

1. Medicaid services recipients and applicants; and
2. Qualified Service Providers providing services to the above individuals or applying to provide services.

Medicaid services recipients and applicants who meet established eligibility criteria would benefit from these rules. Individuals who do not meet established eligibility criteria or qualified service provider standards may not benefit from these rules.

Probable Impact

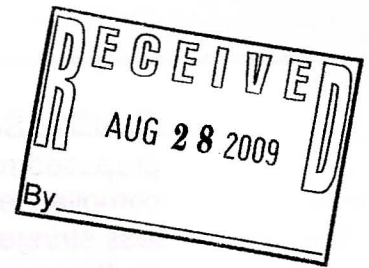
The proposed rules will help to clarify regulations governing the provision of personal care service under the Medicaid State Plan. Clients that need additional units of services now have the opportunity to request additional units of service. The cost to the Department of Human Services for providing the additional units of personal care services is estimated to be \$2,763,446 for the 2009-2011 biennium for 18 months of service delivery. This amount includes a mix of Federal and State dollars.

Probable Cost of Implementation

The estimated increase cost to the Medicaid program is \$2,763,446 for the 2009-2011 biennium for 18 months of service delivery. This amount includes a mix of Federal and State dollars. The economic impact of enforcing the proposed rules on the entities that administer the Medicaid State Plan Services is expected to be minimal.

Consideration of Alternative Methods

Department of Human Services staff reviewed Medicaid program policy to discuss the type of changes that might be needed to implement an additional level of personal care service authorized by the State Legislature and to comply with federally approved changes to the Medicaid State Plan. Other changes to administrative code were proposed to further clarify common questions and issues that arose in discussions with case management entities.



MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Maggie Anderson, Director Medical Services Division

DATE: August 28, 2009

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

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

Small entities affected by this proposed amendment 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. The establishment of less stringent compliance or reporting requirements was not considered because all Qualified Service Providers are required to comply with the same service standards set forth in N.D.A.C. 75-03-23-07. Qualified Service Provider standards are applied uniformly to all providers. The proposed rules will not alter in any material way any required compliance or reporting requirement for these small entities.

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

Qualified Service Provider standards are applied uniformly to all providers. The proposed rule will not alter in any material way any schedule or deadline for compliance or reporting requirements for these small entities. For this reason, less stringent schedules or deadlines for compliance or reporting requirements for these small entities were not considered.

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

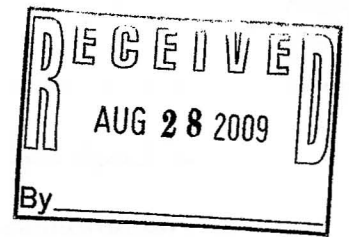
Qualified Service Provider standards are applied uniformly to all providers. The proposed rule will not alter in any material way any schedule or deadline for compliance or reporting requirements for these small entities. For this reason, neither consolidation nor simplification of compliance or reporting 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

Qualified Service Provider standards are applied uniformly to all providers. The proposed rule will not alter in any material way any required performance standards or operational standards for these small entities. For this reason, establishing new performance standards to replace operational standards was not considered.


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

Qualified Service Provider standards are applied uniformly to all providers. Therefore, an exemption of small entities from all or part of the requirements in the proposed rule was not considered.



MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Maggie Anderson, Director Medical Services Division 

DATE: August 28, 2009

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed [New/ Amendments to] N.D. Admin. Code chapter 75-02-02 Medical Services.

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 75-02-02. The proposed rules are not mandated by federal law.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the [new/proposed amended] rules are:

Small political subdivisions consisting of County Social Services boards of counties with populations less than five thousand, small businesses that render personal care services and individuals enrolled as Qualified Service Providers.

The following small entities may also be subject to the rule: None

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be:

No additional administrative costs are expected to be incurred by County Social Service Boards or small businesses that render personal care services and individuals enrolled as Qualified Service Providers because of the proposed amendments.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule:

Consumers and private persons are not expected to experience any negative impact as a result of the provision of additional units of personal care services under the Medicaid State Plan Option. Termination of approved personal care service, if the service has not been used for over 60 days is not anticipated to negatively impact consumers or providers. Clarification regarding the daily rate is not anticipated to have a negative impact on consumers or providers. The addition of the health, welfare and safety provision is not anticipated to have a negative impact on consumers or providers.

The probable benefit to private persons and consumers who are affected by the proposed rule:

Consumers and private persons may benefit from this rule as it allows for the provision of additional units of personal care services under the Medicaid State Plan Option. Providers may benefit from this rule as it will allow for the provision of additional units of service resulting in increased revenue for the provider. Consumers and providers may benefit from this rule to assure that health or safety of the client and provider of services is considered.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be:

The estimated cost in State revenue for providing additional services under the Medicaid State Plan Option is estimated to be \$929,900 for the 2009-2011 biennium for 18 months of service delivery.

5. Alternative Methods

During the last legislative session funds were appropriated to implement additional units of services for Personal Care under the Medicaid State Plan therefore alternatives to providing these services were not considered.



John Hoeven, Governor
Carol K. Olson, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendments to N.D. Admin. Code chapter 75-02-02.

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 29th day of August, 2009.

by: 
W.D. Dept. of Human Services