

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

N.D. Admin. Code Chapters)	<u>REPORT OF THE</u>
75-04-05 and 75-04-06,)	<u>DEPT. OF HUMAN SERVICES</u>
Reimbursement for Providers of)	December 15, 2010
Services to Individuals with)	
Developmental Disabilities)	
and Eligibility for Mental)	
Retardation-Developmental)	
Disabilities Case Management)	
Services)	
(Pages 750-757))	

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

1. The proposed amendments to N.D. Admin. Code chapters 75-04-05 and 75-04-06 are not related to statutory changes made by the Legislative Assembly.
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 August 10, 2010. The record was held open until 5:00 p.m. on August 20, 2010, 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 \$2283.84.
6. The proposed rules amend chapter 75-02-01.2. The following specific changes were made:

Section 75-04-05-01 is amended to remove the definition of units of service in infant development to reflect the change in payment method.

Section 75-04-05-10 is amended to remove infant development from services reimbursed on a daily rate.

Section 75-04-05-22 is amended to remove infant development as a consideration in the development of a daily rate.

Section 75-04-06-06 is created to identify specific services authorized by waiver subject to the fee-for-service payment

method.

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 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 adopted as emergency (interim final) rules under N.D.C.C. section 28-32-03. The statutory ground for declaring the rules to be an emergency is that they are reasonably necessary to avoid a delay in implementing an appropriations measure. A copy of the Governor's approval of the emergency status of the rules is attached.

Prepared by:

Julie Leer
Legal Advisory Unit
North Dakota Department of Human Services
December 15, 2010

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTER 75-04-05
REIMBURSEMENT FOR PROVIDERS OF SERVICES TO INDIVIDUALS WITH
DEVELOPMENTAL DISABILITIES
AND
CHAPTER 75-04-06
ELIGIBILITY FOR MENTAL RETARDATION-DEVELOPMENTAL DISABILITIES
CASE MANAGEMENT SERVICES**

The North Dakota Department of Human Services (the Department) held a public hearing on August 10, 2010, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code chapters 75-04-05 and 75-04-06, reimbursement for providers of services to individuals with developmental disabilities and eligibility for mental retardation-developmental disabilities case management services.

Written comments on these proposed amendments could be offered through 5:00 p.m. on August 20, 2010.

Two individuals attended the public hearing. No written comments were received within the comment period. The commentors were:

1. David Boeck, Protection and Advocacy Project, 400 E Broadway Ste 409, Bismarck, ND 58501
2. Keith Gustafson, Box 93, Bottineau, ND 58318

SUMMARY OF COMMENTS

There was discussion during the hearing about the CMS waiver application and approval process. This discussion is included in the transcript of the public hearing but is not set forth here as it does not pertain to the substance of the rules. The following substantive comments were presented during the hearing:

Comment: 75-04-06-06(1)(b), Is the evaluation and diagnostic team for the Autism Spectrum Disorder Waiver going to be made up of parents and program managers or contracted with someone outside the Department?

Response: The RFP for the evaluation and diagnostic team is out right now. We are looking for one contractor statewide that has a menu of professions we describe within the RFP with experience working with children with autism, especially the very young children this waiver is targeting. We are asking them to show the recent training. The evaluation and diagnostic team will be a contracted entity that will be statewide.

Comment: 75-04-06-06(1)(d), Does a child have to qualify for the waiver to be eligible for program management?

Response: The changes we proposed in eligibility are so the three-year olds and four-year olds could continue to receive the waived services. We were afraid we would

N.D. Admin. Code Chapters 75-04-05 and 75-04-06
Summary of Comments
September 1, 2010

have some kids in the autism waiver that would turn three and we would have to use the adult criteria and they would not qualify for continuing for the next two years. The language we put in the proposed rules is so we could have children that we have picked up continue with services. Also if a child is coming in we would look at, does the child have the diagnosis, we would go through all of those things, and do they have the need for a waived service, just like what we have now. We can have folks that qualify for waivers with the level of care but they may not have a need for a waived service.

Comment: Would a child eligible for this waiver not have to be separately eligible for Medicaid?

Response: All of that remains the same. Program managers will put on the families' Medicaid application that they will be screened for a waived service.

Comment: You've taken the infant development programs out of the rules and regulations completely, do we no longer exist or will the new funding mechanism be put in a similar format elsewhere in the Century Code?

Response: We are currently re-working the purchase of service agreement. But as an infant development provider you still have an increasing purchase agreement with the Department and you also have the individual authorization. Infant development is still a service in the waiver.

Comment: It's wonderful that the Department is going ahead with the Autism Spectrum Disorder Waiver. Congratulations.

Response: No response needed.

Prepared by:



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

In Consultation with: Tina Bay and Deb Balsdon, Developmental Disabilities

September 1, 2010

Cc: Tina Bay, Developmental Disabilities
Deb Balsdon, Developmental Disabilities



Legal Advisory Unit

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1 Hoeven, Governor
1 K. Olson, Executive Director

MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Tina Bay, Director, Developmental Disabilities Division

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapters 75-04-05 and 75-04-06

DATE: September 9, 2010

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 chapters 75-04-05 and 75-04-06. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

75-04-05: The purpose of this rule change is to bring the Infant Development/Early Intervention reimbursement system into CMS compliance.

75-04-06: The purpose of this rule change is to allow children 3 and 4 years of age to be eligible for and receive supports through the Autism Spectrum Disorders waiver.

Classes of Persons Who Will be Affected

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

75-04-05 Families and individuals that receive Infant Development would constitute those who could be affected by these rules.

75-04-06 Families of children who are 3 or 4 years of age and have a diagnosis on the Autism spectrum.

Probable Impact

The proposed changes should have no impact on the regulated community.

Changes to N.D. Admin. Code chapter 75-04-05 will allow for more individualized Infant Development supports.

Changes to N.D. Admin. Code chapter 75-04-06 will allow children who are 3 or 4 years old to qualify for additional support through the Autism Spectrum Disorders waiver.

Probable Cost of Implementation

No anticipated costs for the implementation of proposed changes.

Consideration of Alternative Methods

N.D. Admin. Code chapter 75-04-05: A review of possible solutions to the CMS mandate was considered. A workgroup considered the best approach to the required changes. The review included lengthy discussions from various perspectives and several recommendations. The proposed changes provide an effective and efficient means for a new rate structure implementation.

N. D. Admin. Code chapter 75-04-06: Other eligibility criteria were considered but did not assure that the target population for the Autism Spectrum Disorders waiver would be eligible.



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Hoeven, Governor
K. Olson, Executive Director

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Tina Bay, Director, Developmental Disabilities Division

DATE: September 9, 2010

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-04-05 and N.D. Admin. Code chapter 75-04-06

This regulatory analysis pertains to proposed amendments to N.D. Admin. Code chapter 75-04-05 and N.D. Admin. Code chapter 75-04-06. The proposed changes to 75-04-05 and 75-04-06 are required by CMS.

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

75-04-05 changes are required by CMS for North Dakota to receive federal matching funds for the delivery of Infant Development services.

75-04-06: does not affect small entities.

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

Timelines for changes to both 75-04-05 were prescribed by CMS.

75-04-06: does not affect small entities.

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

75-04-05: Documentation requirements will be imbedded in the new electronic system and will trigger billing.

75-04-06: There will be no adverse affect as a result of the proposed changes.

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

There were no performance standards established for small entities for replacement design or operational standards; therefore, no adverse affects are possible.

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

75-04-05: No Infant Development programs will be exempted.

75-04-06: The proposed changes do not affect any small entities; therefore, no consideration was given.



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n Hoeven, Governor
ol K. Olson, Executive Director

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Tina Bay, Director
Developmental Disabilities Division

DATE: September 9, 2010

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-04-05 and N.D. Admin. Code chapter 75-04-06.

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 75-04-05 and N.D. Admin. Code chapter 75-04-06. The proposed rules could have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to rules are:

75-04-05: Infant Development providers

75-04-06: Does not affect small entities

2. Costs For Compliance

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

75-04-05: Some providers may need to increase documentation to track services delivered.

75-04-06: None

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: none

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

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be:
None

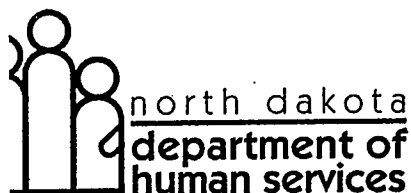
5. Alternative Methods

The Department considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. Those alternatives included:

Continue with retrospective rate setting model resulting in a daily rate or no longer offer Infant Development as a waiver service.

The alternatives were not selected because:

CMS directed the Division to stop using a daily rate. General funds are not available to support services at the same level they are offered when accessing federal funds through a waiver. A fee for service model provided greater assurance of service delivery and ability to individualize services for each family.



John Hoeven, Governor
Carol K. Olson, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code
chapters 75-04-05 and 75-04-06.

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 30th day of June, 2010.

by Julie Leen
N.D. Dept. of Human Services



— State of —
North Dakota
Office of the Governor

John Hoeven
Governor

June 30, 2010

Carol Olson
Executive Office
Department of Human Services
600 E. Blvd. Ave. Dept. 325
Bismarck, ND 58505-0250

RECEIVED

JUN 30 2010

**EXECUTIVE DIRECTOR
ND DEPT. OF HUMAN SERVICES**

Dear Carol,

On June 29, 2010, I received your request for approval of emergency rulemaking to amend North Dakota Administrative Code chapters 75-04-05 and 75-04-06 relating to reimbursement for providers of service to individuals with developmental disabilities and eligibility for mental retardation-developmental disabilities case management services.

I have reviewed the request pursuant to N.D.C.C. § 28-32-03 and find that emergency rulemaking is reasonably necessary to avoid loss of funds appropriated for a duty that is imposed by law.

Sincerely,

A handwritten signature of John Hoeven, consisting of a large, stylized 'J' and 'H' followed by a horizontal line.

John Hoeven
Governor

38:34:58