BEFORE THE
ADMINISTRATIVE RULES COMMITTEE
OF THE
NORTH DAKOTA LEGISLATIVE COUNCIL

N.D. Admin. Code Article 75-04, Developmental Disabilities	)	**REPORT OF THE DEPT. OF HUMAN SERVICES**
(Pages 496-558)	)	**March 13, 2018**

. . . . . .

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

1. The proposed amendments to N.D. Admin. Code article 75-04 are not related to statutory changes made by the Legislative Assembly. However, the proposed amendments are in response to section 50-06-37 of the North Dakota Century Code which requires the Department to develop a new payment system for the developmental disabilities service providers.
2. These rules are related to federal statute or regulation, specifically the State Plan Home and Community-Based Services, 5-Year Period of Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers final rule.
3. The Department uses direct and electronic mail as the preferred ways of notifying interested persons of proposed rulemaking. The Department uses a basic mailing list for each rulemaking project that includes the county social service board directors, the regional human service centers, Legal Services offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the Department. Additionally, the Department constructs relevant mailing

lists for specific rulemaking. The Department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

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

4. A public hearing on the proposed rules was held in Bismarck on December 8, 2017. The record was held open until 5:00 p.m. on December 18, 2017, to allow written comments to be submitted. One comment was received at the public hearing. Eight written comments were received within the comment period. 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 $2,265.50.

6. The proposed rules amend article 75-04. The following specific changes were made:

Section 75-04-01-01 is amended to update, clarify, remove, and add definitions.

Section 75-04-01-02 is amended to update licensing requirements by reducing the number of individuals a person can offer or provide

services to without first obtaining a license and to update a legal citation.

Section 75-04-01-04 is amended to establish criteria for when an applicant or licensee can reapply for a license after a denial or revocation and the effects of a denial or revocation on other services and facilities operated by a licensee due to the denial or revocation.

Section 75-04-01-05 is amended to clarify the Department notification requirements; to remove the Department's ability to suspend a license; and to establish a licensee's ability to continue to provide services during an appeal and return of the license upon final revocation notification.

Section 75-04-01-06 is amended to expand the disclosure of criminal record to include volunteers; to establish requirements if a licensee subcontracts with other entities; and to update language regarding types of criminal background checks and information to be reported to the Department.

Section 75-04-01-06.1 is amended to update and clarify language regarding direct bearing offenses to align with other Department rules; to add language to include volunteers; to update citations and statutory titles; and create a provision that allows the Department to determine an individual to be sufficiently rehabilitated if it involves certain direct bearing offenses.

Section 75-04-01-07 is amended to update the content of the license to include the unique services authorized.

Section 75-04-01-08 is amended to update and clarify the different types of licenses and to establish that rehabilitation accreditation commission applies to existing provider agencies initially and continuously licensed prior to April 1, 2018.

Section 75-04-01-09 is amended to update and clarify language from "provisional license" to "restricted license"; to establish criteria for the Department to issue and terminate a restricted license; and to establish Department's notification requirements to the licensee.

Section 75-04-01-10 is amended to remove the option of a special provisional license; to clarify, establish, and update when a provisional licensed may be issued and renewed; and appeal rights.

Section 75-04-01-11 is amended to establish that license renewal will occur annually on the expiration date of the previous year's license.

Section 75-04-01-12 is amended to update language regarding posting a license.

Section 75-04-01-12.1 is created to establish a Medicaid provider agreement requirement.

Section 75-04-01-13 is amended to update and clarify language.

Section 75-04-01-14 is amended to update and clarify language and to establish a notification and response timeline for unlicensed entities subject to licensure.

Section 75-04-01-15 is amended to update a legal citation; to update terminology; and to establish that rehabilitation accreditation commission applies to existing provider agencies initially and continuously licensed prior to April 1, 2018.

Section 75-04-01-17 is amended to update the identification of basic services subject to licensure.

Section 75-04-01-20 is amended to update and clarify language and terminology; to update a legal citation; to and update and establish requirements for provider applicants that certain policies and

procedures are in place regarding specific client rights, services, and assurances.

Section 75-04-01-20.2 is amended to update the recording and reporting of abuse, neglect, exploitation, and use of restraint by licensees.

Section 75-04-01-21 is amended to update language and to require applicants to update any changes of partners or members of the governing body and any advisory board since the last submission.

Section 75-04-01-22 is amended to update a legal citation and to update and clarify language.

Section 75-04-01-24 is amended to update language and to establish Department's or designee's right to access a provider agency's building or facility and records.

Section 75-04-01-26 is amended to update language regarding the consequence if a provider agency denies the Department's or designee's access to facility or records.

Section 75-04-01-29 is amended to update group home bedroom requirements and client's rights in accordance with federal regulation.

Section 75-04-01-39 is amended to allow the Department to issue a variance to a group home.

Section 75-04-01-40 is created to establish documentation and data reporting requirements for licensees.

Chapter 75-04-02 is being repealed as necessary language from this chapter was added to chapters 75-04-01 and 75-04-05.

Chapter 75-04-03 is being repealed as the loan program is no longer available.

Chapter 75-04-04 is being repealed as the family subsidy program is no longer available.

Section 75-04-05-01 is amended update, clarify, remove, and add definitions.

Section 75-04-05-02 is amended to update and clarify language, terminology, and citations and to remove the Department's prior approval requirement for additional space.

Section 75-04-05-08 is amended to update and clarify language and terminology; to increase the retention of statement of costs data from five years to six; to establish census record requirements for providers for audit purposes; to establish a maximum of hospital and therapeutic leave days; to update and establish provider agency's accounting, reporting and auditing requirements; and to update and establish penalties for false reports.

Section 75-04-05-09 is amended to add language to clarify and establish what each component of the new rate structure includes; to establish maximum authorized assessment score hours for a client; to establish base staffing rate; to establish a vacancy rate add-on; to update language regarding the maximum charge allowed for room and board; to update legal citations; to create the right to establish reasonable ceiling limitations for needed services; to add language regarding Department's review of payments to determine that payments do no exceed estimated payments under Medicare; to establish that provider agencies cannot be reimbursed if they exceed the rate occupancy; to establish the time period services must be provided; and update adjustments and review procedures.

Section 75-04-05-09.1 is created to establish an assessment process.

Section 75-04-05-10 is amended to clarify and update language and establish cost center requirements.

Section 75-04-05-11 is amended to clarify and update language regarding statement of costs allocation requirements and the removal of the identification of the means of financing requirements.

Section 75-04-05-12 is amended to clarify and update language regarding adjustment to cost and cost limitations.

Section 75-04-05-13 is amended to clarify and update language and citations and to update language regarding nonallowable costs.

Section 75-04-05-14 is repealed.

Section 75-04-05-15 is amended to update and clarify language; to update language regarding a provider's use of a depreciation schedule; and to remove language regarding the Developmentally Disabled Facility Loan Program.

Section 75-04-05-16 is amended to update and clarify language and remove language regarding the Developmentally Disabled Facility Loan Program.

Section 75-04-05-17 is amended to update and clarify language and establish allowable costs and documentation associated with related or home organizations.

Section 75-04-05-18 is amended to update and clarify language regarding rental expense paid to related organizations.

Section 75-04-05-19 is amended to update language.

Section 75-04-05-20 is amended to update language regarding a client's personal incidental funds, items, supplies, or services.

Section 75-04-05-21 is amended to update and clarify language.

Section 75-04-05-22 is amended to change staff-to-client ratios to remove all services except of intermediate care facilities and update a citation.

Section 75-04-05-23 is repealed.

Section 75-04-05-24 is amended to update citations and language regarding the application of chapter 75-04-05.

Section 75-04-05-25 is created to establish criteria for which a provider agency may be required to indemnify and reimburse the Department for any federal funds.

Section 75-04-06-01 is amended to update language; to remove an outdated citation; and replace "case management" with "program management".

Section 75-04-06-02.1 is amended to update language; to replace "case management" with "program management"; and replace "mental retardation" with "intellectual disability".

Section 75-04-06-04 is amended to update and clarify language and replace "case management" with "program management".

Section 75-04-06-05 is amended to replace "case management" with "program management".

Section 75-04-06-07 is created to set forth a client's appeal rights for denials, reductions, or termination of services by the Department.

Chapter 75-04-07 is being repealed as the service will no longer exist under the new payment methodology and all remaining necessary language was added to chapters 75-04-01 and 75-04-05.

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. The anticipated fiscal impact resulting from the implementation of

the proposed amendments is minimal.

10. A constitutional takings assessment was prepared and is attached to this report.

11. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Jonathan Alm
Legal Advisory Unit
North Dakota Department of Human Services
March 9, 2018

north dakota department of human services

Legal Advisory Unit

(701) 328-2311
Fax (701) 328-2173
Toll Free (800) 472-2622
Relay ND TTY (800) 366-6888

Doug Burgum, Governor
Christopher Jones, Executive Director

SUMMARY OF COMMENTS RECEIVED REGARDING PROPOSED AMENDMENTS TO N.D. ADMIN. CODE ARTICLE 75-04 DEVELOPMENTAL DISABILITIES

The North Dakota Department of Human Services (the Department) held a public hearing on December 8, 2017, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code article 75-04, Developmental Disabilities.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 18, 2017.

Six individuals attended the public hearing and one provided a public comment. Eight written comments were received within the comment period. The commentors were:

1. Roxane Romanick, Executive Director, Designer Genes of North Dakota, 830 Longhorn Drive, Bismarck ND 58503
2. Pamela Mack, Director of Advocacy Services, Protection & Advocacy Project, 400 East Broadway Suite 409, Bismarck ND 58501-4071
3. Borgi Beeler, President, Kalix, PO Box 1030 Minot ND 58702-1030
4. Sandi Marshall, CEO, Development Homes, Inc, 3880 S Columbia Road, Grand Forks ND 58201
5. Bruce Murry, Executive Director, North Dakota Association of Community Providers, 1500 E Capitol Ave Suite 200, Bismarck ND 58501
6. Tina Bay, Director of Developmental Disabilities, DHS, 600 East Blvd Ave Dept. 325, Bismarck ND 58505-0250
7. Kirsten Dvorak, Executive Director, The Arc of North Dakota, 1500 N Capitol Suite 203, Bismarck ND 58504
8. Michael Remboldt, CEO, HIT, Inc., 1007 18th Street NW, Mandan ND 58554

SUMMARY OF COMMENTS

Comment: I am Roxane Romanick, I am the executive Director for Designer Genes of North Dakota, I would like to thank you for this opportunity to offer comment on the proposed amendments. Designer Genes represents 205 individuals with Down syndrome across the state of ND and those that support them. Most of our members receive supports and services through ND's Developmental Disability system to live and grow with dignity in our communities. The development of the Developmental Disability (DD) system over the past 35 years has meant that institutional care is not the default placement for individuals with Down syndrome.

The efforts by the Department of Human Services to change outdated language in the code is much appreciated. However I'd like to suggest additional work.

Specifically, I'm not going to read this but this is in reference to the eligibility in reference to infants and toddlers in changing the language to say developmentally delayed to of referenced to a developmental delay or high risk condition.

Additional work is suggested in 75-04-06-04 as noted below:

Changes proposed in initial written testimony:

For purposes of this section:
a. "Developmentally~~ delayed~~ delay" means a condition of a child, from birth through age two:
b. "High risk condition" means a condition of a child, from birth through age two: Who, based on a diagnosed physical or mental condition, has a high probability of ~~becoming~~ developing a developmentally~~ delayed~~; or (2) Who, based on informed clinical opinion which is documented by qualitative and quantitative evaluation information, has a high probability of ~~becoming~~developing a developmentally~~ delayed~~.

Changes proposed in revised written testimony:

75-04-06-04
(pg. 105) 1."...The collective professional judgment of the team must be exercised to determine whether the child ~~is~~ has a high risk condition or has a developmentally~~ delayed~~,... If a child, from birth through age two, is ~~either~~ has a high risk condition or has a developmentally~~ delayed~~,..."
(pg. 106) 2.a " Developmentally~~ delayed~~" means a condition of a child, from birth through age two:.."
(pg. 106) 2b "High risk condition" means a condition of child, from birth through age two... "
(pg. 106) 2b2 "Who, based on informed clinical opinion which is documented by qualitative and quantitative evaluation information, has a high probability of ~~becoming~~ developing a developmentally~~ delayed~~.

The remaining comments will relate to the various sections of the code, which I will walk through chronologically below and I can actually give you the page numbers, that may be a little easier in the code.

Response: The Department agrees with the recommended changes proposed in section 75-04-06-04 in the revised written testimony, as it aligns with people first language. The Department has updated the rules to reflect the proposed changes to section 75-04-06-04.

Comment: In regards to 75-04-01 which is on page 3, in reference to subsection 5 of NDAC 75-05-01-01 I am proposing that an individual becomes a consumer of the Department of Human Services once that individual is known to the Department and that should not be two different terms in the code (such as 3. Client). The consumer should be the chosen term as it steers the Department away from a medical model to one that is driven by the individual seeking service. I believe that it's important that if an individual reaches out to the Department for services and supports through any of the various divisions and offices, that attempts would be made to meet the consumers' needs even if eligibility for certain federally mandated programs is not met. We continue to have a gap for those individuals whose presenting conditions meet the state definition of developmental disability but receive no support due to not meeting current eligibility and screening requirements set forth by the Department.

Response: The Department agrees to remove "consumer" from Article 75-04 and replace with "client" to avoid confusion.

Comment: On page 4, with reference to the definition to Employment Support under subsection 9 of NDAC 75-04-01-01 – While this section does reference "job development" further down in the definition, I would recommend that the following language be considered:

> "...ongoing supports to assist clients in obtaining and maintaining paid employment in an integrated setting."

Response: The Department agrees with the recommended changes proposed for the definition of "employment support" in section 75-04-01-01. The Department will also make changes to the definition of "employment supports" in section 75-04-05-01 for consistency purposes. The Department has updated the rules to reflect the proposed changes to the definition of "employment support".

Comment: On page five in reference to the definition of Less Restrictive under subsection 19 of NDAC 75-04-01-01 – I would ask why less restrictive only relates to "residential situation" when restrictive practices can also occur in activities that occur outside of a home setting such as activities in the day, work settings, educational settings. I am assuming that these definitions relate to the points where they are used in the code; however, I would challenge the Department to create a philosophy for client choice, inclusive practices, and living with dignity through their language in the code.

Response: The Department appreciates the comment. In reviewing the proposed rules, the Department has determined that the term "less restrictive" only appears once, as a defined term in section 75-04-01-01. Therefore, the Department has removed "less restrictive" from section 75-04-01-01. The Department also acknowledges that "least restrictive appropriate setting" is defined in North Dakota Century Code section 25-01.2-01.

Comment: On subsection 22 of NDAC 75-04-01-01, which is on page 6: Prevocational Services- Prevocational services seems to be a subset of Employment Support. I would question why the two need to be broken apart. The distinction continues to promote the idea that individuals with disabilities need to change or be ready to have meaningful work. Emerging practices would indicate that strong person-centered planning can launch an individual into successful work that he/she is passionate about. If a separate service needs to be maintained, I recommend that the Department consider a more rigorous review of situations where individuals are receiving "prevocational services" to assure that they are close to transitioning to Employment Support.

Response: Language in the Developmental Disabilities Traditional Medicaid Waiver (Waiver) states that the participation in prevocational services is not a prerequisite for individual employment and small group employment. The Waiver also identifies the process that will be followed to remain active in prevocational services. The Department will not make a change to the proposed rule as it would be contrary to the Waiver requirements.

Comment: The next one is, I have 26, but it's now subsection 25 of NDAC 75-04-01-01 in the draft under Program Management on page 6 – Thank you for maintaining the strong language that existed in the code under "case management". The language in this definition reinforces the philosophy that I pointed out under the "consumer" definition. Continued training in family-centered practices, person-centered planning, and systems will continue to promote the practice that this definition suggests in the region.

Response: The Department appreciates this comment. No change requested.

Comment: Then I'm going to page nineteen which is in reference to Applicant guarantees and assurances. Under NDAC 75-04-01-20(1)(o), I recommend changes to the following language as follows:

> "Assures that adaptive equipment, where appropriate for personal hygiene, self-care, communication, sensory regulation, communication, and mobility ~~toilet training, toileting, mobility, communication, or eating~~."

I feel like the language that is currently there is fairly outdated and not as comprehensive as it could be.

Response: The Department agrees that some of the language is outdated and has updated the rule to read as follows:

> o. Assures that adaptive equipment, where appropriate for ~~toilet training, toileting~~personal hygiene, self-care, mobility, or ~~eating~~communication is provided in the service ~~facility~~ for use by individuals with ~~multiple~~ disabilities consistent with the person-centered service plan;

Comment: In NDAC 75-04-01-20(1)(y), I appreciate the inclusion of this language especially in reference to providers meeting the needs of individuals birth to three under the Individuals with Disabilities Education Act (IDEA). This also includes language and appreciation for the language in Section 75-04-01-40, that's probably -4 regarding Documentation and Data Reporting Requirements also strengthens the language to assure that providers are meeting the requirements under the federal law and regulation.

Response: The Department appreciates the comment. No change requested.

Comment: In regards to the section on Family Subsidy (NDAC 75-04-04) which is on pages 38-44, I am strongly against the removal of this section from the 75-04. While the program currently has no funding, I feel that removal of the section will eradicate the footprint of a program that's been in existence since 1979. There is no other program like this in the Department and/or in state government. This program assisted our families that found out that their unborn baby had significant health care concerns and had to be born out of state. Families that found out their baby was being airlifted out of state shortly after birth benefited from this program. Children with long-term hospitalizations who were not able to stay on the Medicaid Waiver were assisted with this program. I recommend that the section be maintained. Section 75-04-04-04.3, I don't know if any of these numbers are or if I

did this in the middle of the night, contains language that a wait list be created in lieu of a lack of funding. This language assures that the Department is not mandated to provide the services if there is no funding, but does hold the Department accountable to creating a waiting list that could show need in upcoming sessions. I am requesting that this language remain and that a wait list be initiated and maintained.

Response: The Department will make no change at this time as the current chapter of 75-04-04 is obsolete. The Department determined that repealing the chapter would be the best course of action instead of making significant changes to a program that is not currently funded. If funding resumes to this program, the Department will create rules accordingly.

Comment: In regards to Section 75-04-05-09, regarding Rate Payments, located on pages 63-69, and I may be misguided in this section and I would certainly own up to that but this section is silent to the Infant Development rate payment methodology. Currently, only procedural guidance is available to direct payment to providers who provide Infant Development services. Because of this, the Department could make changes at any time without public comment. I am recommending that the Infant Development rate payment methodology be included in this section while it's open for amendments.

Response: The Developmental Disabilities Traditional Medicaid Waiver (Waiver) requires a description of rate methodology which includes infant developmental rate payment methodology. The Department is unable to make changes to this methodology without federal approval. If changes are made to the Waiver, public comment is required. The Department will make no change at this time as the commentor's concerns are addressed through the Waiver and federal requirements.

Comment: On page 66 under NDAC 75-04-05-09(11)(a) I am concerned that the language in this section regarding "reasonable ceiling limitations" may inadvertently impact services provided to infants and toddlers through the Infant Development service. Participation in the Part C of the federal Individual with Disabilities Education Improvement Act does not allow a limitation on service provision. I am also concerned about how this may affect the implementation of other individuals' person-centered plans. It would be important for the Department to be transparent about the accumulation and analysis of statistics related to costs. Adequate data supports are needed by the Department to accomplish this in a meaningful and transparent manner.

Response: The Department will make no change at this time as the Department is required to comply with federal policies regarding limits and the last statement in subdivision a of subsection 11 of section 75-04-05-09 identifies that.

Comment: Designer Genes is highly invested in assuring a strong Early Intervention system in North Dakota. The proposed administrative code changes continue the distinction between eligibility requirements for individuals birth through two and three on up. In regards to Criteria for service eligibility on page 103, in NDAC 75-04-06-02.1. This section needs additional language to assure it is not used for infants and toddlers. I am suggesting the following language:

"75-04-06-02.1. Criteria for service eligibility-Age 3 and Above"

I am just recommending that that section include in the title Age 3 and Above so that there is no misunderstanding that it should not be used for infants and toddlers which is indicated below but I just felt like it should be specific right at the beginning.

Response: The Department agrees with the comment and has updated the rules as follows:

75-04-06-02.1. Criteria for service eligibility – Children age three and above.

Comment: On page 104 in NDAC 75-04-06-02.1(1)(a). In this section, I would suggest the inclusion of the following language be included:

"A diagnosis of the condition of intellectual disability must be made by an appropriately licensed professional using valid and reliable assessment practices and diagnostic criteria accepted by the American psychiatric association."

It is my recommendation that the Department take this opportunity of code amendment to add language to address eligibility criteria that is more appropriate for children ages 3 – 12. Determining whether someone has an intellectual disability when they are continuing to work on developmental milestones should not be happening. If the Department continues the practice of using the same eligibility criteria for children ages, 3 – 12, then it's critical that additional training is provided to individuals conducting assessments and to eligibility teams considering the eligibility of someone in this age range. And then consistency in practice across the state is needed.

In NDAC 75-04-06-02.1(3)(a) which is still on page 104. In the National Association of State Directors of Developmental Disabilities Services Report to North Dakota on Eligibility, Serve Array, and Person-Centered Practices: Observations and Recommendations for Consideration completed this past summer, on page 6, the consultants completing the report suggest that the "language in the regulation (for age-adults) seems more complex than it might need to be". This is in reference to the "Issue..."not severe enough to constitute a developmental disability". The report suggested "The "not severe enough" eligibility language reportedly may have led to confusion about eligibility". The recommendation states: "North Dakota could establish a clearer category perhaps just stating as many states do, the individual for purposes of eligibility must have an intellectual disability and/or a developmental disability....Basically having an intellectual disability gets you through the eligibility door to the next determination which is an assessment of need for services." The opportunity to eliminate the "not severe enough language" is in front of us and I would encourage the Department to consider this change to the proposed code amendment.

Response: The Department appreciates the comment. The Department will make no change at this time as the Department anticipates the proposed change will have a financial impact on the Department's budget and also require additional administrative oversight by the Department as it changes eligibility criteria. Increases and expansions such as this would generally be addressed during the Legislative Assembly.

Comment: On page 106 in regards to NDAC 75-04-06-04(2)(b) on criteria service eligibility for– Children birth through age two. I am recommending the Department consider the following language change in this section that better reflects the procedure they use to make the determination of eligibility using this category

> "...Who, based on a current medical, social, and psychological information ~~diagnosed physical or mental condition~~, has a high probability of ~~becoming a~~ developing a developmentall~~y~~ delaye~~d~~; or..."

So what I'm suggesting is switching out the words, diagnosed physical or mental condition, with current medical, social and psychological information. I am also recommending in this section that the Department add language to address eligibility for infants and toddlers whose parents who may have may potentially be eligible for program management themselves. This is the current practice in the field, but it is not reflected in the code.

Response: The Department appreciates the comment. The Department will make no change at this time as the Department anticipates the proposed change will

have a financial impact on the Department's budget and also require additional administrative oversight by the Department as it changes eligibility criteria. Removing diagnosed physical or mental condition and replacing it with any information regarding current medical, social and psychological information would increase and expand eligibility. Increases and expansions such as this would generally be addressed during the Legislative Assembly. In addition, the current language in the administrative code does reflect current practice of a diagnosed physical or mental condition as well as considering medical, social and psychological information. These two eligibility criteria are accounted for in the high risk list and the informed clinical opinion.

Comment: Under 75-04-06-05 on Service availability on pg. 107. The language in this section is not conducive to meeting the needs for infants and toddlers with delays and/or disabilities under the Department's obligation as the lead agency for Part C of the IDEA. Currently, the Department has informed the federal Department of Ed Office of Special Education Programs that they are meeting the "service coordination" requirement in the law through their program management system. If funds were not able to provide this service as well as the additional services as indicated on an individual's Individuals Family Service Plan, the Department could not establish a wait list and would need to find an alternate way of providing services. I feel that this section needs to be expanded to address this responsibility.

In addition, I would recommend that the language in section 75-04-06-07 on page 107 be reviewed to assure that the procedural safeguards under Part C of IDEA are not impacted by the stated language.

Response: The Department will make no change at this time. The Department is in compliance with federal law and regulations. Federal law supersedes state law; therefore no changes need to be added to this section. The Department must still receive appropriate appropriations to provide services to eligible clients.

Comment: And lastly the administrative code relating to Developmental Disabilities is silent to language that would provide guidance to the Department on assisting eligible individuals to access funding for the services available through the provider system. Presently, the only way to do that is successful screening to the Individuals with Intellectual Disabilities/Developmental Disabilities Medicaid Waiver. Continued transparency through public comment on changes to how need determinations are made will assist individuals and those that support them to understand how services are accessed and funded.

Response: Comments are noted, no changes necessary.

Comment: 75-04-01-01 (10) - This section refers to the definition of "Family Support Services". Of concern is the exclusion of respite care as an included service. P&A recommends that respite care be added to the final sentence of the definition to provide clarity regarding the available services within the Family Support Program, specifically the inclusion of respite care.

Response: The Department will make no change at this time as respite is not a service available in the Developmental Disability Traditional Medicaid Waiver. Respite is a component of in home supports, which is identified in the definition of family support services.

Comment: 75-04-01-01 (19) - This section refers to the definition of "Less Restrictive" as it pertains to the residential services provided within the Developmental Disabilities (DD) system. NDCC § 25-01.2-01 (6) already provides for a definition of "Least restrictive appropriate setting" which means the setting that allows an individual with a developmental disability to develop and realize the individual's fullest potential and enhances the individual's ability to cope with the individual's environment without unnecessarily curtailing fundamental personal liberties. P&A recommends that the definition used in the DD section of ND Century Code be used within the corresponding ND Administrative Code to ensure consistency in implementation and interpretation. A new definition is not necessary and could be a source of confusion.

Response: The Department appreciates the comment. In reviewing the proposed rules, the Department has determined that the term "less restrictive" only appears once, as a defined term in section 75-04-01-01. Therefore, the Department has removed "less restrictive" from section 75-04-01-01. The Department also acknowledges that "least restrictive appropriate setting" is defined in North Dakota Century Code section 25-01.2-01.

Comment: 75-04-01-17 (7)-This section identifies the services provided to eligible clients within the DD Program. Subsection 7 outlines the included services within the area of Family Support Services. As identified in the first comment, P&A recommends that respite care be added to this subsection as an available service.

Response: The Department will make no change at this time as respite is not a service available in the Developmental Disability Traditional Medicaid Waiver.

Respite is a component of in home supports, which is identified in the definition of family support services.

Comment: 75-04-01-20 (1g) - Subsection 1g addresses client pay for compensable labor in accordance with federal law. P&A does not have any comment on the changes to the language; however, would like to reiterate our concern with the standard of sub-minimum being used within North Dakota to provide lower than minimum wage for work performed by people with disabilities.

Response: The Department appreciates this comment. No change requested.

Comment: 75-04-01-20.2 - This section provides for requirements of licensed entities to record and report abuse, neglect and use of restraints; however, it does not include exploitation. ND law found at NDCC 25-01.3-01 defines abuse, neglect and exploitation relative to people with developmental disabilities. P&A recommends that exploitation be added to both the heading and the content of this section of the administrative code.

Response: The Department agrees with the recommended changes to add "exploitation" to the areas suggested. The Department has updated the rules to reflect the proposed changes. The Department will also make changes to section 75-04-01-20 for consistency purposes.

Comment: 75-04-04 - This section previously provided for Family Subsidy funds to eligible parents/families. During this past legislative session funding was removed from this program; however, this continues to be a vital program for families with children who have significant disabilities and healthcare needs. P&A recommends that this section of administrative code be reinstated and a wait list be started consistent with section 75-04-04-04.3. This will ensure that the long-standing history of this program is not lost and that monitoring of its needs are maintained through the wait list.

Response: The Department will make no change at this time as the current chapter of 75-04-04 is obsolete. The Department determined that repealing the chapter would be the best course of action instead of making significant changes to a program that is not currently funded. If funding resumes to this program, the Department will create rules accordingly.

Comment: 75-04-05-01 (16) - This section defines "Day Habilitation" as it pertains to the new funding system for DD for the state of North Dakota. While there are still many unknowns about the new funding process which will not be answered until implementation, P&A does want to ensure that careful consideration is given to the potential impact on the changes to this area of services, how they are defined, and thus implemented. The change in reimbursement for Providers must not in any way create a lack of choice regarding individual versus group employment, or community-based versus center-based day habilitation. This is imperative with the state's responsibility to comply with Olmstead vs L.C.

Response: No change requested. Changes to the developmental disability reimbursement system began in 2009 when the Department was mandated by 2009 House Bill No. 1556 to contract with a private vendor to study the current reimbursement system and make recommendations to the 2011 legislative assembly. Based on the information provided, 2011 Senate Bill No. 2043 was passed and state law, N.D.C.C. § 50-06-37, instructed the Department along with stakeholders to develop a new payment methodology for developmental disability services. Since that time, the Department along with the steering committee and other stakeholders have met over 50 times to develop the new payment methodology. Along with this development, the new Developmental Disabilities Traditional Medicaid Waiver that becomes effective 4/1/18 includes two additional employment related services which will increase client choice when selecting appropriate services.

Comment: 75-04-05-01 (33) - This section defines "Hospital Leave Day" and allows for payment for services for clients when a client has been hospitalized. This is available for clients who reside in an intermediate care facility for the intellectually disabled (ICF/IID). Of concern is that this definition does not allow for a comparable reimbursement for clients who require daily support in a residential setting such as "Residential Habilitation". This inequity in reimbursement creates a fiscal disincentive to provide services to clients in community-based settings and inadvertently creates a fiscal incentive for residential services in institutional settings. P&A recommends that the definition of "Hospital Leave Day" be extended to "Residential Habilitation" services within the new reimbursement system.

Response: The Department will make no change at this time as the new payment methodology includes a 4% inflator in residential habilitation and the purpose of this inflator is to account for therapeutic and hospital days. Providers will receive this 4% on all clients regardless if they utilize therapeutic days or have hospital absences.

Comment: 75-04-05-01 (63) - This section defines "Therapeutic Leave Day" and allows for payment of services for clients who reside in an ICF/IID setting and are away from the setting. Of concern is that this definition does not allow for a comparable reimbursement for clients who require daily support in a residential setting such as "Residential Habilitation". This inequity in reimbursement creates a fiscal disincentive to provide services to clients in community-based settings and inadvertently creates a fiscal incentive for residential services in institutional settings. P&A recommends that the definition of "Hospital Leave Day" be extended to "Residential Habilitation" services within the new reimbursement system.

Response: The Department will make no change at this time as the new payment methodology includes a 4% inflator in residential habilitation and the purpose of this inflator is to account for therapeutic and hospital days. Providers will receive this 4% on all clients regardless if they utilize therapeutic days or have hospital absences.

Comment: 75-04-05-08 (2b & 2c) - These two subsections provide for the maximum number of days that a client can be away from an ICF/IID for both a "Hospital Leave Day" and a "Therapeutic Leave Day". As noted in the above two comments, limiting these to clients receiving services in only ICF/IID facilities creates inequities in reimbursement and is concerning. P&A recommends that these two sections include "Residential Habilitation" services.

Response: The Department will make no change at this time as the new payment methodology includes a 4% inflator in residential habilitation and the purpose of this inflator is to account for therapeutic and hospital days. Providers will receive this 4% on all clients regardless if they utilize therapeutic days or have hospital absences.

Comment: 75-04-05-09.1 - This section refers to the assessment used to determine provider reimbursement for services rendered on behalf of a client. The current language and content of the revised administrative code does not outline or offer any recourse or appeal right for clients should they disagree or have concerns with the assessment, or the outcome of the assessment. P&A recommends that language be added to provide for a formal appeal regarding the client assessment process, along with the inclusion of written notice and appeal rights.

Response: The Department will make no change at this time as section 75-04-06-07 provides guidance to clients of their appeal rights. The Department is also updating chapter 75-01-03 Appeals and Hearings to include "intellectual disabilities-developmental disabilities program management" and it currently uses the term

"medicaid" which includes services and benefits provided under the Developmental Disabilities Traditional Medicaid Waiver. Division policy will also identify client appeal rights for assessments.

Comment: 75-04-05-10 (4b) - This section outlines additional costs that are allowed for reimbursement for facility-based "Day Habilitation". Of concern is that this definition does not allow for a comparable reimbursement for clients who are receiving "Day Habilitation" in a community-based setting. This inequity in reimbursement creates a fiscal disincentive to provide services to clients in community-based settings and inadvertently creates a fiscal incentive for "Day Habilitation" services within facility-based settings. P&A recommends that the additional costs that are allowed for "Day Habilitation" reimbursement include both facility and non-facility-based services.

Response: The Department agrees with the recommended changes and has updated the rules to address the commentor's concern.

Comment: 75-04-05-21 - This section refers to the transfer, discharge and expulsion of clients from services. P&A does not have any comment regarding the current content or the changes to the language within the administrative code.

However, P&A does recommend that additions be made regarding the need to ensure that the notice to the client is in written form and is inclusive of the applicable timeframe in which the action of transfer, discharge or expulsion will occur. P&A also recommends that language be added which requires a provider to include the interdisciplinary team in all placement and potential discharge decisions, along with the expectation that all opportunities to prevent discharge are exhausted prior to formal action being taken by the provider.

Response: The Department appreciates this comment. The Department will make no change at this time as Department policy identifies these requirements and any movement of clients are subject to the policies and procedures of the North Dakota program management system and the approval of the Department pursuant to subsection 2 of section 75-04-05-21. The Department will consider strengthening the language in its policy regarding transfer, discharge, and expulsion of clients.

Comment: 75-04-06-02.1 (2) - This section addresses the eligibility process for services within the DD program. P&A recommends that the state consider removing the requirement that a person must have an intellectual disability or cognitive deficit to qualify for DD Program Management and DD waiver services.

There are currently many children and adults who are not receiving the necessary services who have a Developmental Disability in accordance with federal law. P&A recommends that the state align federal law and state eligibility with one another and ensure that services are provided in a consistent manner.

Response: The Department appreciates the comment. The Department will make no change at this time as the Department anticipates the proposed change will have a financial impact on the Department's budget and also require additional administrative oversight by the Department as it changes eligibility criteria. Increases and expansions such as this would generally be addressed during the Legislative Assembly.

Comment: 75-04-06-07 (1) - This section outlines a client's due process rights if there has been a denial, reduction, or termination of services by the state. Subsection 1 identifies that a client may appeal an adverse decision within thirty days of the date of the notice; however, the language within this subsection does not indicate the way the notice is provided. P&A recommends that the language be changed to ensure that all notices regarding a denial, reduction, or termination of service be done in written form and that the written notice include information regarding the client's appeal rights. The written notice should also include language which allows for the client to receive the information in an alternative format or to allow for accommodations within the notification and appeals process.

Response: The Department will make no change at this time as the Department is also updating chapter 75-01-03 Appeals and Hearings, which requires written notice of the right to appeal. The Department currently informs clients in writing of their appeal rights but will consider strengthening this language in the appropriate documents and reviewing alternative formats.

Comment: Thank you for the providing a copy of the proposed amendments and the opportunity to comment.

I represent one of several DD Providers that is serving on the Steering Committee that has been working on the new payment system based on assessment scores, so I am familiar with the reasons and discussions behind the changes to the NDAC. As with any change, there are a variety of opinions regarding what should happen and what the impact of the change will be. My comments are directed at changes in the proposed NDAC that were not discussed by the Steering Committee and/or do not align with decisions made by the Steering Committee.

I believe that most or all of the concerns raised in my comments are errors and/or oversights that can be easily corrected. If that statement is incorrect, I request that the Department engage the Steering Committee to review and discuss the impact of any disputed item.

This has been a long and challenging process, and I appreciate the dedication and commitment shown by the Department as we've worked through countless issues and details until finally arriving at the point where we are nearly ready for implementation.

NDAC 75-04-05-08 Financial reporting requirements. (4) Auditing (d) changes the time frame for a provider to submit a response to the preliminary audit from 45 to 15 days. The Steering Committee did not discuss this change. Fifteen days is plenty of time in most situations, but too short for a deadline, particularly if the report happens to arrive while employees are on leave or in the middle of another audit or year-end closing. We request a time frame of 30 days to respond to the preliminary audit report.

Response: The Department agrees with the recommended changes proposed. The Department has updated the rules to reflect the proposed change.

Comment: NDAC 75-04 -05-10 Cost Centers.
The cost centers where direct and indirect costs are allocated on a provider agency's statement of costs may include:

- The cost methodology developed by the Steering Committee utilizes the cost centers as listed (Administration, Indirect Program Support, Direct Program, Room, Board, Other). However, the Steering Committee did not discuss specific line items, changes to line items, assignment of costs, or allocations. The proposed NDAC appears to limit types of allowable costs by including a specific list of allowable line items for each type of cost center. The proposed wording eliminates currently allowed costs in some types of cost centers (see details below), and fails to include several current reimbursable line items, such as Rental of Office Equipment, Leisure & Recreation, the ICF Provider Tax, and Consultations (dietician, pharmacy, physical therapy, etc.). In addition, the proposed NDAC appears to eliminate current flexibility for unique situations and changing circumstances by eliminating the miscellaneous line item and the ability to add line items.

  We don't believe that the intent was to limit costs to the listed line items, but our concern is that it may be used in that manner. We request that

flexibility be maintained by requiring providers to report costs using the format specified by the Department instead of listing line items in NDAC.

Alternatively, we request that {1) all currently allowable line items on the cost report be recognized in the new listing included in 75-04-05-10 and (2) wording be added to clarify that the listed accounts for each type of cost center are not intended to be all-inclusive. It is reasonable to expect that unique situations and changes will result in appropriate inclusion of costs that are not listed in NDAC.

- The proposed NDAC lists vehicle repairs as a cost allowable for all services, but Transportation of clients, including vehicle insurance and gas, is only listed for facility- based Day Habilitation and "room" ("room" costs are paid by clients instead of included in the program rate paid by the Department). Currently, all vehicle costs are allowed in ICF/IID and all day programs, and all vehicle costs except depreciation are allowed as part of direct residential program costs. We request that transportation of clients, including vehicle insurance and gas, be listed as a direct program cost for all program s, not just facility-based day habilitation . In addition, ICF/IID, Non-facility-based Day Habilitation, Pre-Vocational Services, Small Group Employment, and Individual Employment should include vehicle depreciation.

- Building costs are only listed as allowable for Administration and facility-based Day Habilitation. Building costs are currently allowable and should be included for Indirect Program Support, Pre-Vocational Services, Small Group Employment, Individual Employment, ICF/ IID, and Independent Habilitation. And although the list of allowable line items for facility-based Day Habilitation includes several building-related costs, building depreciation is missing. Note that even programs such as Individual Employment or Independent Habilitation require space for staff offices.

- We can't guarantee that we noticed all necessary but missing line items. Again, flexibility to adapt to changing circumstances and unique situations is essential for any workable accounting system.

- We believe that most or all of the changes that would result from implementation of NDAC 75-04-05-10 as proposed are unintentional, and can be corrected by either eliminating the list or referring to Department forms, or carefully revising the list and building in flexibility as proposed above.

Response: The Department agrees with the commentor's concern as the intent of proposed language was not to limit costs to the listed line items. The Department has updated the rules to reflect the commentor's concern.

Comment: NDAC 75-04-05-11 Statement of Costs Allocations
(9) Indirect program support costs. Total indirect program support costs, not including personnel and fringe benefits, must be allocated to basic service categories, exclusive of production, room, and board, based on actual units of service. When determining the day habilitation ratio of indirect program support costs, total day habilitation units are divided by eight and rounded to the nearest whole number.

- Day habilitation units should be divided by 32 (eight hours per day x 4 units per hour) instead of eight to convert units to days.
- Excluding personnel and fringe benefit costs from allocation to service categories leaves those costs out of any reimbursable category, effectively making the costs non-allowable.
- The Steering Committee did not discuss allocation methods or the impact of the proposed change.
- It appears that both changes are unintentional oversights.

Response: The Department agrees with the recommended changes proposed regarding day habilitation units being divided by 32 instead of 8. The Department has updated the rule to reflect the proposed change. The Department will make no change at this time to costs for personnel and fringe benefits as they will be allocated based on subsections 1 and 2 of section 75-04-05-11.

Comment: NDAC 75-04-05-11 Statement of Costs Allocations
(10) Administrative costs. Total administrative costs must be allocated to all service categories, exclusive of residential habilitation room, board, and production, based upon the ratio of the basic service cost to total cost excluding administrative and production costs. The percentage calculated for residential habilitation must be based on total costs with the allocation made only to direct care costs, direct program support costs, and indirect program support costs.

- Application of this section is unclear. The current method allocates administrative costs to residential programs including costs for training, room, and board, with the total administrative allocation added to the training column. I can't determine whether:
  1. the prosed NDAC may result in a similar allocation with a higher "room" cost (because it appears that all building costs, even for non-ICF residential programs, are included in the " room" definition), so more administrative cost would be shifted to non-ICF residential

programs. Large amounts are involved, so the impact would be a substantial distortion of costs,

OR

2. the proposed NDAC may result in excluding all room and board costs when allocating administrative cost, so administrative cost would be shifted away from non-ICF residential programs. The dollar amounts would be small enough that the impact would be minimal.

- The Steering Committee did not discuss allocation methods or the impact of the proposed change.
- It appears that this change is an unintentional oversight.

Response: The Department agrees with the commentor's concern as the intent of the proposed rule was not to change current practice. The Department has updated the rule to reflect the proposed changes.

Comment: **Chapter 75-04-01** Section 75-04-01-01 Definitions. Sub-section 14 changes the definition of a group home to include settings with more than two individuals rather than four. We would suggest that number be changed to "four or more". There are residential settings that historically are shared by three people that have not and should not be considered to be licensed group homes.

Response: The Department agrees with the recommended changes proposed for the definition of "group home" in section 75-04-01-01 and has changed it to "more than three individuals". The Department will also make changes to the definition of "group home" in section 75-04-05-01 for consistency purposes. The Department has updated the rules to reflect the proposed changes to the definition of "group home".

Comment: Section 75-04-01-02. License required. We would suggest that a license be required for an organization providing a service to "four or more" individuals, rather than the proposed change to "more than two". While we recognize this is a different issue than the definition of group home, it makes sense to share this consistent language.

Response: The Department will make no change at this time as it does not agree with this recommendation as the proposed change ensures health and safety of individuals with developmental disabilities.

Comment: Section 3. 75-04-01-04 License denial or revocation. Suggest adding "substantial" non-compliance in first sentence.

Response: The Department will make no change at this time as the Department currently has discretion to revoke or deny a license when noncompliance with the rules are or are not substantial. The term "substantial" is not defined in rule so the Department would also have deference regarding when it would be appropriate. The provider and applicant also have appeal rights if they believe the Department has not properly exercised its authority.

Comment: Section 4. 75-04-01-05 Notification of license. Suggest adding a step between subsections 2 and 3 that would allow for a provider to request reconsideration of the denial or revocation of a license. The described process jumps from notification of such action to the only recourse being a request for an administrative hearing. Such hearings may be overly time- consuming and costly for providers, and may create an overly-litigious and adversarial process. A Request for Reconsideration step may allow for a more informal and less adversarial approach to seeking resolution and allow for additional information to be brought to bear which may eliminate the need for a costly administrative hearing. Such a step in the process would be consistent with other processes for appeal utilized by the Department.

Response: The Department will make no change at this time as it is an unnecessary step that is already addressed by current practice. The Developmental Disabilities Division staff currently discusses a proposed action to deny or revoke a license prior to taking an action. If an action is taken to deny or revoke, the Department reviews any information provided by the provider or applicant to determine if it should proceed with the action. The same individuals involved in the decision to deny or revoke are involved in a review of material provided by the provider or applicant in its appeal and prior to the Department taking an action to deny or revoke. The Department is not prohibited in withdrawing its notice to deny or revoke after it reconsiders its actions based on a review of the material provided.

Comment: Section 75-04-01-10. Provisional license. Subsection 2 refers to accreditation by the old name for the Council on Quality and Leadership and should therefore be updated.

Response: The Department agrees with the proposed recommended change. The Department has updated the rule to reflect the proposed change.

Comment: Section 18. 75-04-01-20 Applicant guarantees and assurances. Subsection 1.d newly proposed language could set up a provider to be required to provide a level of services that may reflect the wishes of the team but are not supported by the level of supports funded through a person's Individual Budget Allocation in the new payment system. Suggest deleting new language, as it is not supported by the Century Code sections quoted in the section, and represents an overreach.

Response: The Department agrees with commentor's concern and has updated the rules accordingly.

Comment: **Chapter 75-04-02** - No comment

Response: No change requested.

Comment: **Chapter 75-04-03** - No comment

Response: No change requested.

Comment: **Chapter 75-04-05** Chapter title - Suggest replacing the term "Reimbursement" with "Payment" throughout the document, to be more consistent with a purchase-of-service payment methodology.

Response: The Department agrees with the recommended changes to replace "reimbursement" with "payment" where appropriate and has updated the rules to reflect the proposed changes.

Comment: **Section 75-04-05 -01 Definitions:**
3. Administrative costs - substitute "not client related" with "not associated with direct care and program supports".

Response: The Department will not change the definition at this time as this change would change the meaning and potentially may not allow indirect costs for care.

Comment: Section 75-04-05-01 Definitions:
11. Client authorized representative - consider adding legal in front of representative for clarification. It is unclear if this definition also includes persons who act in the role of friend or family member, provider representative, representative payee, conservator, or power of attorney.

Response: The Department has updated the definition of "client authorized representative" based on another commentor's comment and has removed "guardian" from the definition. The definition of "client authorized representative" in section 75-04-05-01 has been changed as follows:

> "Client authorized representative" means a person who has legal authority, either designated or granted, to make decisions on behalf of the client.

Comment: Section 75-04-05 -01 Definitions:
27. Facility-based - it is recommended that non-facility based also be defined as it is used in the Non-allowable section later in the rules.

Response: The Department will make no change at this time as a definition of "non-facility based" is not required. If the facility does not fit the definition of "facility-based" it would fall into the "non-facility based" category.

Comment: Section 75-04-05 -01 Definitions:
31. Group home - see above comment on this definition in 75-04-01. Recommend changing to "four or more" rather than "more than two".

Response: The Department agrees with the recommended changes proposed for the definition of "group home" in section 75-04-05-01 and has changed it to "more than three individuals". The Department will also make changes to the definition of "group home" in section 75-04-01-01 for consistency purposes. The Department has updated the rules to reflect the proposed changes to the definition of "group home".

Comment: Section 75-04-05 -01 Definitions:
Suggest a new definition be added; Outlier. This is a crucial term and process that is entirely left out of the chapter, either intentionally or by mistake. Either way, it is a very essential element of the new payment system, and is egregious to leave out.

Response: The Department agrees that outlier process is essential to the new payment system. The Department has added language to subsection 2 of section 75-04-05-09 as follows:

> A provider may request and the department may grant an outlier request for clients who have needs exceeding the client's assessment score.

The Department will make no change at this time in adding a definition of "outlier" as "outlier" only appears in this subsection and the Department will include information in the Developmental Disabilities Divisions policy regarding the outlier process.

Comment: Section 75-04-05-08 Financial Reporting requirements
Subsection 2 a.1 and a.2 - substitute "client" for "consumer" and check throughout to be consistent with definitions.

Response: The Department agrees to remove "consumer" from Article 75-04 and replace with "client" to avoid confusion.

Comment: Section 75-04-05-08 Financial Reporting requirements
Subsection 4.d a 4.e on auditing - suggest changing both timelines to 30 days for provider response and department final audit.

Response: The Department agrees with the recommended changes to 30 days for provider's response and has updated the rules to reflect the proposed changes. The Department does not concur with changing the timeline for the Department.

Comment: Section 75-04-05-09 Rate payments
Subsection 2 - There is a glaring omission of any discussion of the Outlier process in this section. It is strongly suggested that the Department add language that recognizes and *authorizes* a process to approve increased direct care staff hours for those individuals with extraordinary health and safety needs. The new payment system was originally initiated by legislation requiring a new system to be designed and implemented that specifically provides for adequate supports for people with extraordinary medical and behavioral needs. It is recognized by the Department that the new payment system is built around averages, and that there is a percentage of people whose needs exceed the limitations of a system built on averages.

Recommended language for insertion in this section would be to the effect of, "The Department shall implement a process whereby clients with extraordinary health

and safety needs (Outliers) may be eligible for additional direct care hours beyond the level of support authorized by the multiplier calculation. Needed hours shall be requested by the provider through the person centered service planning process, and approved by the Department." This item could be inserted after 2.a. in this subsection, as a stand-alone point.

Response: The Department agrees with the commentor's concern and has updated the rules to reflect the concern.

Comment: Section 75-04-05-09 Rate payments
Subsection 11 Limitations - this is new language not previously discussed by the Steering Committee. The establishment of ceiling limitations appears to be unchecked, with no due process afforded to the provider community.

Response: The Department will make no change at this time as most of this language is in current administrative rules and was moved to this section for clarity. Proposed rule does add language that is needed for the Department to calculate the upper payment limit for compliance with Medicaid regulations.

Comment: Section 75-04-05-09 Rate payments
Subsection 12 Adjustments and review procedures - suggest 30 days for provider response to the first notification of adjustments and the request for reconsideration.

Response: The Department agrees with the recommended changes and has updated the rules to reflect the proposed change from fifteen days to thirty days.

Comment: Section 75-04-05-10 Cost Centers
Subsection 1 Administration - some of the listed costs could be attributable to Program Support costs, and including them as administrative costs serves to artificially increase the administrative costs, which are paid at only 10%. There are legitimate expenditures that are specific to client supports that should be allowable under subsection 2, Indirect Program Support costs, such as printing for example.

Response: The Department agrees with the commentor's concern as the intent of the proposed language was not to limit costs to the listed line items. The Department has updated the rules to reflect the commentor's concern and to provide clarification on the intent.

Comment: Section 75-04-05-11 Statement of Cost Allocations -
Subsections 9 and 10 - a provider should be able to direct charge items that are directly associated with a department or service.

Response: The Department will make no change at this time as the proposed rule would allow providers to directly assign costs and if the cost cannot be directly assigned they must use the identified allocation methods.

Comment: Section 75-04-05-13 Non-allowable costs
18. Entertainment costs - delete or define "activities".

Response: Department will make no change at this time as federal regulations identify "activities"; therefore there is no need to further define "activities" in administrative rule.

Comment: Section 75-04-05-13 Non-allowable costs
26. Travel - add local to state and federally sponsored

Response: No change is necessary as the Department views state sponsored to include local municipalities' sponsorship.

Comment: Section 75-04-05-13 Non-allowable costs
28. Items or services for clients - add "when it results in additional costs".

Response: No change is necessary as the Department considers "primarily for the convenience of the clients" to have the same meaning as the commentor's proposed language.

Comment: Section 75-04-05-13 Non-allowable costs
31. Cost of education -31.c delete "and is in a position" as this adds nothing for clarity

Response: The Department will make no change at this time. The Department believes that the language "and is in a position" is necessary to ensure that the person is in a position with that employer.

Comment: Section 75-04-05-13 Non-allowable costs
33. Membership fees or dues - recommend increasing this amount to at least $6,000 to allow providers to belong to both state and national associations.

Response: The Department agrees with the recommendation to increase the amount to $6,000.

Comment: Section 75-04-05-16 Interest Expense
Subsection 1.a (6) - delete "for rate-setting purposes".

Response: The Department agrees with the recommended change and has updated the rules to delete "for ratesetting purposes,".

Comment: Section 75-04-05-22 Staff to client ratios
This section assumes that the new payment system will provide adequate staffing to meet the CFR requirements.

Response: The Department appreciates this comment. No change requested.

Comment: --- Page 10 --- NDAC §75-04-01-06.1, at the 4th line from end of subsection 1, paragraph a, after 14-09-22.1, neglect of child: While child neglect cited here is a felony, we point out this results in a lifetime bar to employment vs. a 5 year bar for intentional crimes in subsection 4, including crimes of violence. Perhaps the Department should consider a form of rehabilitation by similar or other means to those in subsection 4.

Response: The Department appreciates this comment. The Department will make no change at this time as the proposed rule is similar to other Department rules regarding criminal background checks and direct bearing offenses.

Comment: --- Page 40 to 46 --- NDAC §75-04-05-01:
Subsection 5: After the word tool, adding the phrase "as adopted" or similar would clarify the Department has the authority to modify the tools, such as with the Outlier system. While the Outlier system is mentioned once in the proposed Waiver Amendment, the Department may wish to more clearly reserve the authority to have an outlier system here or elsewhere in the Administrative Code.

Response: The authority for the "tools" used is in N.D.C.C. § 50-06-37 as the Department shall utilize the support intensity scale or the state-approved intensity

scale. The Department has added the following language to subdivision a of subsection 2 of section 75-04-05-09 for the outlier system: "A provider may request and the department may grant an outlier request for clients who have needs exceeding the client's assessment score."

Comment: Subsection 11: The Department should consider adding language to address conservators, representative payees and agents under an advanced directive (attorney in fact) within the scope of their legal decision making authority.

Response: The Department agrees with this comment and has changed the definition of "client authorized representative" in section 75-04-05-01 to read as follows:

> "Client authorized representative" means a person who has legal authority, either designated or granted, to make decisions on behalf of the client.

The Department has also added the updated definition of "client authorized representative" in section 75-04-01-01.

Comment: Subsection 12: We recommend a Client Representative be limited to family member who has maintained substantial contacts with the person receiving services. This would be similar to the law for consent to healthcare services and avoid an uninvolved, distant relative from interfering in the individual's life.

Response: The Department agrees with the proposed recommended changes. The Department has changed the definition of "client representative" in section 75-04-05-01 as follows:

> "~~Consumer~~Client representative" means a ~~parent, guardian,~~client authorized representative or relative~~, to the third degree of kinship, of an individual with developmental disabilities~~ who has maintained significant contacts with the client.

Comment: Subsection 15: Many providers offer other human services to populations outside of people with DD. The DD Division should ensure that accounting and reporting requirements of administrative costs are consistent with those other Department funded services to avoid conflicting requirements for the organization's fiscal management. See especially treatment of direct and indirect costs in Skilled Nursing Facilities.

Response: The Department will make no change at this time as different programs and services have different reporting requirements.

Comment: --- Page 73 --- NDAC §75-04-05-10: Subsection 4, paragraph b: Allowing a variety of expenses in a facility based employment support service, not disallowing them in non-facility services may create a bias toward facility based services. Transportation would be an important example. Allowing the expenses equally for both would be more consistent with community integration values and mandates.

Response: The Department agrees with the commentor's concern. The Department has updated the rules to reflect the commentor's concern and to provide clarification on the intent.

Comment: --- Page 83 --- NDAC §75-04-05-13 (Nonallowable costs): Subsection 33: Membership in the American Network of Community Options and Resources (http://ancor.org) often exceeds $10,000 per year for provider agencies, and the limit should be increased to $15,000. In addition, this restriction is probably inconsistent with the intent of the new payment system, because providers now bear the burden of cost control.

Response: The Department agrees that the cost should be increased and has updated the rules to reflect an increase of $3,000 to $6,000.

Comment: --- Page 96 --- NDAC §75-04-05-22 (Staff-to-client ratios): In the first paragraph, replace the phrase "Additional staff" with "Different staffing levels" to allow the provider agency to vary the staffing ratio up or down from the ratio used for determining the rate, considering the circumstances.

Response: The Department's interpretation of "different staffing levels" could result in providers going below federal requirements. Therefore, the Department will not make a change to the proposed rule.

Comment: General Comments: NDACP remains concerned about the adequacy of night staffing reimbursement. This concern extends to other instances of supports necessary for health and safety, but when the individual does not require frequent intervention.

Response: The Department appreciates this comment. No change requested.

Comment: 75-04-01 & 75-04-05 - The titles of these chapters should be changed to be consistent with 75-04-06. They should read "Licensing of Programs and Services for Individuals with Intellectual Disabilities-Developmental Disabilities" and "Reimbursement for Provider Agencies of Services to Individuals with Intellectual Disabilities-Developmental Disabilities" All sections should be reviewed to ensure consistency.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-01(5) – The definition of "consumer" should be removed. Client and consumer are used interchangeably in the developmental disability system so it is confusing to have two different definitions in code. These chapters of administrative rule apply to people found eligible for developmental disability services. All sections need to be reviewed and replace "consumer" with "client".

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-01(8) - The definition of "Developmental disability" should be updated to reflect the definition in NDCC 25-01.2.01
(a) "Is attributable to a mental or physical impairment or combination of mental and physical impairments; **including Down syndrome**."
(e) "Reflects the individual's needs for a combination and sequence of special, interdisciplinary, or generic **care**, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated."

Response: While amending the administrative rule to include the language noted in the commentor's comment is not required, the Department agrees for consistency purposes to update the proposed rules. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-01(14) – Recommend changing the definition of "Group home" to state "...housing more than **three** individuals....". The proposed definition that states more than two individuals would potentially change some current living arrangements that are not group homes and that was not the intent of the change.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-01(17) – the definition of "Intellectual Disability" in 75-04-06-02.1 is consistent with current practice, therefore recommending changing the definition in this section to be consistent throughout. Recommended language is "Intellectual disability" means a diagnosis of the condition of intellectual disability, based on an individually administered standardized intelligence test and standardized measure of adaptive behavior as accepted by the American Psychiatric Association, and made by an appropriately licensed professional".

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-05(4) – This section should apply to all settings and services. Recommend adding "or service" after "facility". Section would read as follows: .... If clients have been removed from the licensed facility or service because of a health, ...

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-06.1 – This section should apply to all settings and services. Recommend replacing the term "facility" with "provider agency" throughout section.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-08(2), 75-04-01-17(5), 75-04-05-01(65)(a)(2) – "Employment services" needs to be changed "employment supports" to be consistent with definition in 75-04-01 and 75-04-05.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-15 – This section identifies CARF accreditation as an allowable standard. Recommend adding language similar to what is stated in 75-04-01-08(2) to ensure it is clear that CARF accreditation is only applicable for those provider agencies that were licensed prior to 4/1/18.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-20(n) – the purpose of this section is to ensure all residential services coordinate with other services outside of the residential setting, however if the definition of residential services is understood from section 75-04-05, the intent would not be clear. Recommend removing "residential services" and replace with "residential provider agency".

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-20(o) – Recommend removing "facility" to ensure this is provided in all settings not only facilities.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-20(u) – Recommend removing "parent or parents, guardian" and replace with "client authorized representative".

Response: The Department agrees with the commentor's proposed recommended changes. For consistency purposes, the Department has made the change throughout chapter 75-04-01 and has added a definition of "client authorized representative" that is consistent with the definition in chapter 75-04-05. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-01(29) – In the definition of "standards", the term "individual" needs to be removed to ensure all employment supports are included.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-05-01(24) – In the definition of "documentation", the term "electronic" needs to be added to provide clear guidance that the web based case management is considered documentation. Recommend the following language: ...means the furnishing of written or electronic records including...

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-05-01(42) – Recommend changing the definition to align with the purpose identified in NDCC 50.24.1. "Medical assistance program" means the program which pays the cost of medical care and services to eligible clients pursuant to NDCC 50-24.1.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-05-01(47) – Definition is unclear of who should be included in the planning process. Recommend changing language to the following: "Person-centered service plan" means an individual plan that identifies service needs of the eligible client, the services to be provided, and is developed by the client or client authorized representative, or both, client selected team, and developmental disabilities program manager, considering all relevant input.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-05-09.1(1) – Assessment practice does not allow an assessment to be completed prior to 90 days if there are no qualified responders. Recommend adding ... within ninety days or once there are sufficient qualified responders, for a client who has been....

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules as follows:

1. An assessment must be completed within ninety days or at the time there are sufficient qualified responders, for a client who has been determined eligible to receive developmental disabilities services and is receiving a service that requires an assessment score to determine payment. The assessment effective date is the first date the client began receiving a service.

Comment: 75-04-05-13 – Current NDAC 75-04-07-05(2)(p) and Division policy identifies materials and monetary reinforces for clients as nonallowable expenses. Recommend adding this to this section.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-05-20(11) – Recommend adding language that the decision must be documented in the client's person centered service plan to be consistent with NDCC 25-01.2-06(7). Section should read ... The decision must be documented in the provider agency's records and the client's person centered service plan.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-06-01(1) – The last sentence in this paragraph make reference to chapter 75-05-04. This chapter does not provide guidance to this section. Recommend removing that reference in this paragraph.

Response: The Department agrees with the commentor's proposed recommended changes. The Department has updated the rules to reflect the proposed changes.

Comment: 75-04-01-01 (19) Less restrictive- supports should be provided based upon functional needs and choice, and the wording "less control" implies that

individuals have little to no control in choice. In addition to less restrictive should also include workplace and activities in the community.

Response: The Department appreciates the comment. In reviewing the proposed rules, the Department has determined that the term "less restrictive" only appears once, as a defined term in section 75-04-01-01. Therefore, the Department has removed "less restrictive" from section 75-04-01-01. The Department also acknowledges that "least restrictive appropriate setting" is defined in North Dakota Century Code section 25-01.2-01.

Comment: 75-04-01-01 (25) Thank you for the language on "Program Management". The definition supports a person's wish and needs of each individual through person-centered planning.

Response: The Department appreciates this comment. No change requested.

Comment: 75-04-01-20 Applicant guarantees and assurance
We recommend the consideration of changes to the following language: Assures that adaptive equipment where appropriate for personal hygiene, self-care, communication, sensory regulation, communication and mobility. This wording allows for better supports for all individuals with I/DD.

Response: The Department partially concurs, as previously addressed in a prior comment, with the recommended changes and has updated subdivision o of subsection 1 of section 75-04-01-20 as follows:

> Assures that adaptive equipment, where appropriate for ~~toilet training, toileting~~personal hygiene, self-care, mobility, or ~~eating~~communication is provided in the service ~~facility~~ for use by individuals with ~~multiple~~ disabilities consistent with the person-centered service plan;

Comment: 75-04-04 Family Subsidy
While the program currently has no funding, Individuals with I/DD frequently require support to perform basic daily activities and to achieve the national goals of equal opportunity, full participation, independent living, and economic self-sufficiency. Families are overwhelmingly the primary and often the major source of support for their family member with I/DD. Nearly three quarters of people with I/DD live in the family home and, according to The Arc's Family and Individual Needs for Disability Supports (FINDS) survey, most of these family caregivers provide more than 40

hours of care per week (including 40% who provide more than 80 hours of care per week). In keeping the language, this will ensure that the program is not lost and maintained.

Response: The Department will make no change at this time as the current chapter of 75-04-04 is obsolete. The Department determined that repealing the chapter would be the best course of action instead of making significant changes to a program that is not currently funded. If funding resumes to this program, the Department will create rules accordingly.

Comment: 75-04-06.02.1 this section addressed the eligibility criteria for services within the DD program. The Arc of North Dakota recommends that it remove the requirement that a person must have an intellectual disability of cognitive deficit to qualify for DD Program Management and DD services. Many individuals (children and adults) that are not receiving the necessary services have a Developmental Disability in accordance with Federal Law.

Response: The Department appreciates the comment. The Department will make no change at this time as the Department anticipates the proposed change will have a financial impact on the Department's budget and also require additional administrative oversight by the Department as it changes eligibility criteria. Increases and expansions such as this would generally be addressed during the Legislative Assembly.

Comment: General Comment: People with I/DD must have access to the supports necessary to lead meaningful life in their community. These supports should be provided based upon functional needs and choice. Supports should lead to opportunities for community involvement and develop of individual interests. Adults with I/DD and parents of minor children with I/DD, should be able to hire and fire personal supports to help them perform everyday activities, make decisions and exercise control in their lives.

Response: The Department appreciates the comment. The Department will make no change at this time as the Department anticipates the proposed change will have a financial impact on the Department's budget and also require additional administrative oversight by the Department as it changes eligibility criteria. Increases and expansions such as this would generally be addressed during the Legislative Assembly.

Comment: 75-04-01-01.14- Group Home Definition
The verbiage that requires licensing for "more than two" could create some hardships for providers serving individuals residing in privately owned houses and/or town homes. There is no reason to change the language from the current version which states four (4).

Response: The Department agrees with the recommended changes proposed for the definition of "group home" in section 75-04-01-01 and has changed it to "more than three individuals". The Department will also make changes to the definition of "group home" in section 75-04-05-01 for consistency purposes. The Department has updated the rules to reflect the proposed changes to the definition of "group home".

Comment: 75-04-05-01.31- Group Home Definition
This definition is new, and if truly required, should be based on four (4) individuals. (See comments above for 75-04-01-01.14)

Response: The Department agrees with the recommended changes proposed for the definition of "group home" in section 75-04-05-01 and has changed it to "more than three individuals". The Department will also make changes to the definition of "group home" in section 75-04-01-01 for consistency purposes. The Department has updated the rules to reflect the proposed changes to the definition of "group home".

Comment: 75-04-05-08.3.d - 75-04-05-08.3.f(II)(c) -Audit Requirements
Subsections "d","e", and "f" are extremely detailed and cumbersome to read and interpret. The sole purpose of completing a Statement of Costs, as we were told in the Steering Committee meetings, is to compute the upper payment limit. Is all of the information and detail needed to compute the Upper Payment Limit?

I am still confused on the Upper Payment Limit calculation. Why do we need to report the costs in such detail? A provider bills for a unit of service provided and OHS pays the provider for that service. No cost settlement exists with the new payment system, therefore is not the cost of the service used to compute the Upper Payment Limit, the payment that OHS made to the provider.

Response: The Department will make no change at this time as the information in this section is necessary to determine compliance with the Federal upper payment limit requirement.

Comment: 75-04-05-10- Cost Centers
This level of detail is seriously over detailed and constrictive. Bottom line is that we are going to a "Fee for Service" payment model. It makes no sense in making such constrictive definitions. What does it matter if a group home purchases a file cabinet and charges it to Direct Program Support, Indirect Program Support, Direct Administration, or Indirect Administration? As along as the item purchased is allowable and necessary, why put such constraints on the reporting requirements? In addition, part of the process was supposed to be easier and more transparent. The current system is extremely complicated and subjective. We are trying to move to a system that is easier and more objective. Also, the Statement of Cost presented to the providers is extremely complicated, which will put more administrative burden on a provider, not less.

Response: The Department agrees with the commentor's concern and has updated the rules to simplify this section and to clarify the Department's intent.

Comment: In 75-04-05-09(5), it refers to food stamps, should this be changed to SNAP.

Response: The Department agrees with this comment and updated the rules to replace "food stamps" with "supplemental nutrition assistance program".

Prepared by:

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

In Consultation with: Tina Bay, Developmental Disabilities

January 17, 2018

cc: Tina Bay, Developmental Disabilities

MEMO

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: Tina Bay, Director, Developmental Disabilities

RE: Regulatory Analysis of Proposed North Dakota Administrative Code article 75-04

DATE: October 31, 2017

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed to North Dakota Administrative Code Article 75-04. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of $50,000.

Purpose

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code article 75-04. Federal law does mandate some of the proposed rules.

Classes of Persons Who Will be Affected

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

- Client's that receive services from the developmental disabilities system.
- Developmental Disability Service Providers.

Probable Impact

The proposed amendments may impact the regulated community as follows:

- The new payment system will change how hours of service are allocated to clients.
- Clients will be required to have a new assessment completed to allocate hours of service.
- Services will be added to allow for more employment related options.
- The methodology and components for establishing a rate for services will change.
- The requirements to cost settle will be eliminated.
- Licensing options will be changed.

- A state funded only program will be discontinued.

Probable Cost of Implementation

- Anticipate the fiscal impact will be minimal upon adoption of the rules.

Consideration of Alternative Methods

- In order to comply with state law, a new payment system for developmental disability services was necessary. Over the past 6 years, the Department has worked with the developmental disability providers to develop the new system. Many options were explored with the assistance of several consultants and the proposed rules include what we believe to be the best approach.
- In order to align with funding appropriated to the Department, a state funded only service was discontinued.

MEMORANDUM

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: Tina Bay, Director, Developmental Disabilities

DATE: October 31, 2017

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code article 75-04

The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This regulatory analysis pertains to proposed amendments to N.D. Admin. Code article 75-04. Federal law mandates some of the proposed changes.

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 small entities that are impacted by these proposed amended rules are developmental disability service providers. Compliance with these rules is required if a provider wishes to provide developmental disability services as this new methodology will be explained in our state plan and 1915(c) waiver, which is our agreement with our federal partner (CMS). Providers will no longer be required to cost settle with the Department and this is reflected in the rule changes which will reduce the reporting requirements for some providers.

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

The proposed amendments will eliminate a cost settlement with the Developmental Disability Service Providers. The timelines for the Developmental Disability Service Provider to respond to preliminary audit findings has been shortened. Department timelines for completing preliminary audits and final audits has also been shortened in order to finalize audit reports in a timelier manner.

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

The proposed amendments will no longer require a statement of cost to determine a cost settlement between the Developmental Disability Service Providers and the Department. Statement of costs and compliance audits will only be required for Developmental Disability Service Providers who offer Intermediate Care Facilities for Individuals with Intellectual Disability services, whereas previously all providers were required to submit statement of costs.

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

The Developmental Disability Service Providers are responsible to meet performance standards as well as operational standards imposed by federal and state law. The proposed amendments do not impose any design standards or impose any additional operational standards. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

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

The requirements of the proposed amendments will need federal approval. Affected services are funded with Medicaid funds. If Developmental Disability Service Providers choose not to comply with federally approved requirements they will not qualify for reimbursement of services provided.

MEMORANDUM

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: Tina Bay, Director, Developmental Disabilities

DATE: October 31, 2017

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code article 75-04.

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 article 75-04.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are Developmental Disability Service Providers.

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: No additional administrative 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 clients who are affected by the proposed rule: DHS was required to develop a budget neutral system. This does mean that some providers may see an increase in financial reimbursement while others may see a reduction in financial reimbursement. Clients who are receiving services may also see an increase or decrease in the amount of hours of service they are authorized for.

The probable benefit to private persons and clients who are affected by the proposed rule: There will be a standard rate across the state for services included in this methodology change. Clients will be assessed on their need and funding will follow the client to the provider of their choice.

4. Probable Effect on State Revenue

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

DHS was required to develop a budget neutral system.

5. Alternative Methods

In order to comply with state law, a new payment system for developmental disability services was necessary. Over the past 6 years, the Department has worked with the developmental disability providers to develop the new system. Many options were explored with the assistance of several consultants and the proposed rules include what we believe to be the best approach.

FISCAL IMPACT

The estimated fiscal impact for implementing the changes to Article 75-04 is minimal.

north dakota department of human services

Legal Advisory Unit

(701) 328-2311
Fax (701) 328-2173
Toll Free (800) 472-2622
Relay ND TTY (800) 366-6888

Doug Burgum, Governor
Christopher Jones, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code article 75-04.

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 31st day of October, 2017.

by: _____
N.D. Dept. of Human Services