

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

N.D. Admin. Code Chapter)	<u>REPORT OF THE</u>
75-02-02, Medical Services)	<u>DEPT. OF HUMAN SERVICES</u>
)	March 13, 2018
(Pages 302-332))	

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

1. The proposed amendments to N.D. Admin. Code chapter 75-02-02 are being amended as a result of section 17 of 2017 House Bill No. 1012 and House Bill No. 1120.
2. These rules are related to federal statute or regulations, specifically, Title 42, Code of Federal Regulations, part 440, relating to face-to-face requirements for home health services.
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 6, 2017. The record was held open until 5:00 p.m. on December 18, 2017, to allow written comments to be submitted. No comments were received at the public hearing. Two written comments were received within the comment period. The "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 \$2,325.24.
6. The proposed rules amend chapter 75-02-02. The following specific changes were made:
 - Section 75-02-02-03.2** is amended to update language for consistency purposes and to add definitions of "exercise program", "Indian health services or tribal health facility or clinic", and "weight loss program".
 - Section 75-02-02-08** is amended to update language for consistency purposes, to comply with federal rules changes, to clarify language related to early and periodic screening, diagnosis and treatment, hospice care, durable medical equipment and supplies, private duty

nursing services, and home health care services, to remove the definition of "exercise program" and "weight loss program" as the definitions were moved to section 75-02-02-03.2, to update and clarify prior authorization and provider agreement provisions, and to update the pharmacy services to levels approved in Medicaid state plan.

Section 75-02-02-09.1 is amended to update when copayments are or are not imposed.

Section 75-02-02-09.3 is amended to update language for consistency purposes.

Section 75-02-02-09.4 is amended to clarify language and to increase the limitation on behavior health services from four units per calendar year to ten units per calendar year.

Section 75-02-02-09.5 is amended to ensure compliance with fair labor standards act home care rule and electronic visit verification efforts; while allowing for the use of a daily rate, if needed, to facilitate client choice and least restrictive environment.

Section 75-02-02-10 is amended to update language for consistency purposes, to rename the section, to combine language from section 75-02-02-10.1 as both sections address psychiatric services for individuals under age twenty-one, and to establish a payment criteria for services outside certain psychiatric residential treatment facility.

Section 75-02-02-10.1 is amended to update language for consistency purposes, to rename the section, and to insert the payment limitations for inpatient psychiatric services which was removed from subsection 4 of section 75-02-02-10.

Section 75-02-02-10.2 is amended to update language for consistency purposes, to tie in the behavior health division's

licensing rules for treatment of addiction, and to clarify Medicaid coverage for licensed addiction counselors practicing within a recognized Indian reservation for certain services without the need to be licensed under chapter 75-09.1.

Section 75-02-02-10.3 is created to insert and update language from section 75-02-02-10.2 regarding limitations on partial hospitalization psychiatric services and to eliminate confusion between the difference of partial hospitalization psychiatric services and substance use disorder treatment.

Section 75-02-02-11 is amended to update language for consistency purposes and to update the coordinated services requirements for individuals who misutilize services.

Section 75-02-02-12 is amended to clarify the division's role as it relates to Medicaid payment for services and removes language regarding how services should be provided in the emergency room.

Section 75-02-02-13 is amended to update language for consistency purposes and to update and clarify the referral process for out of state care to account for recipients who do not have a primary care provider.

Section 75-02-02-13.1 is amended to update language for consistency purposes, to clarify when foster parents may enroll to provide non-emergency medical transportation, to create when a guardian of a vulnerable adult may enroll to provide non-emergency medical transportation, and to remove limitations for county agencies to allow them to bill non-emergency medical transportation.

Section 75-02-02-13.2 is amended to update language for consistency purposes between article 75-04 and chapter 75-02-02.

Section 75-02-02-27 is amended to remove duplicative language and to incorporate rules relating to 2017 House Bill No. 1120.

Section 75-02-02-29 is amended to update language for consistency purposes, to update language to clarify when the department may make payments for services that would otherwise require a primary care provider referral, and to update language in section 5 based on changes made to sections 75-02-02-10.2 and 75-02-02-10.3.

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 nominal.
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



Doug Burgum, Governor
Christopher Jones, Executive Director

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

The North Dakota Department of Human Services (the Department) held a public hearing on December 6, 2017, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code chapter 75-02-02, Medical Services.

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

No one attending the public hearing provided comments. Two written comments were received within the comment period. The commentors were:

1. Michelle Gayette, Aging Services, North Dakota Department of Human Services, 600 E Blvd Ave Dept 325, Bismarck ND 58505-0250
2. Kristen Hasbargen, President, ND Association of County Social Services Directors, c/o Richland County Social Services, 413 3rd Ave N, Wahpeton ND 58075

SUMMARY OF COMMENTS

Comment: Wouldn't placing the word adult after child make sense as well? Couldn't a guardian be reimbursed for medical transport for a Medicaid-eligible adult?

75-02-02-13.1. Travel expenses for medical purposes - Limitations.

1. For purposes of this section:

- c. The cost of travel provided by a parent, spouse, or any other member of the recipient's medical assistance unit may be allowed as an expense of necessary medical or remedial care for recipient liability purposes. No parent, spouse, friend, household member, or family member of the recipient may be paid as an enrolled provider for transportation for that recipient. An individual who provides foster care, kinship, or guardianship may enroll as a transportation provider and is eligible for reimbursement to transport a medicaid-eligible child to and from medicaid-covered medical appointments in situations where the medicaid-eligible child's medical needs exceed ordinary, typical, and routine levels.

Response:

The Department is proposing the following change to address the comment received:

75-02-02-13.1. Travel expenses for medical purposes - Limitations.

2. General requirements.

- c. The cost of travel provided by a parent, spouse, or any other member of the recipient's medical assistance unit may be allowed as an expense of necessary medical or remedial care for recipient liability purposes. No parent, spouse, friend, household member, or family member of the recipient may be paid as an enrolled provider for transportation for that recipient. An individual who provides foster care, kinship, or guardianship may enroll as a transportation provider and is eligible for reimbursement to transport a medicaid-eligible child to and from medicaid-covered medical appointments in situations where the medicaid-eligible child's medical needs exceed ordinary, typical, and routine levels. A guardian of a vulnerable adult may enroll as a transportation provider and is eligible for reimbursement to transport a medicaid-eligible adult, for whom the guardian has been court-ordered to provide guardianship services, to and from medicaid-covered medical appointments.

Comment: The North Dakota Association of County Social Services Directors (NDACSSD), would like to take this opportunity to express our support of the changes to Administrative Rules Chapter 75-02-02- Medical Services, with request to consider additional revisions listed below.

The NDACSSD supports the change that allow counties to bill for non-emergency medical transportation providers. Allowing for non-emergency medical transportation is critical to ensure the elderly and other vulnerable populations have access to early preventative medical care. This addition will reduce the no-show rate due to the inability to get to appointments and will be cost effective by reducing missed appointments. Many vulnerable people do not currently have access to specialty care, including behavioral health services, due to financial limitations of traveling to areas that have these services available.

The NDACSSD is requesting an addition in allowing relatives to bill as non-emergency medical transportation providers. Family is often willing to assist, but may lack the financial resources to provide transportation assistance. Relatives or close friends are often the only resources that people have available. The NDACSSD is requesting consideration to allow relatives/friends, upon determination of financial hardship criteria, to be added to the list of non-emergency medical transportation providers.

Thank you for the opportunity to provide input during the review of the Administrative Rules process.

Response:

The Department appreciates the NDACSSD reviewing the proposed rules and providing comments. The Medicaid staff has discussed adding relatives and friends as options for non-emergency medical transportation providers; however, the Department has not revised the proposed rules to include the addition, as requested. The Medicaid staff clearly understands

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the challenges related to non-emergency medical transportation; however, a change such as the one proposed would need to be more fully considered. For example, Medicaid does not require face to face visits for eligibility application processing, so criteria that would be used to determine "financial hardship" would need to be evaluated and established. This addition requested would also be expected to increase Medicaid expenditures and also require additional administrative oversight by the Medical Services Division. Increases and expansions such as this would generally be raised through the Department's budget proposal to the biennial Legislative Assembly.

Prepared by:

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

In Consultation with: Maggie Anderson, Medical Services

January 4, 2018

cc: Maggie Anderson, Medical Services

MEMO

TO: Jon Alm, Director, Legal Advisory Unit

FROM: Maggie Anderson, Director, Medical Services Division

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

DATE: September 11, 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 North Dakota Administrative Code Article 75-02-02. The 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. Administrative Code chapter 75-02-02. Federal rules require the proposed rules related to home health.

Classes of Persons Who Will be Affected

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

- Providers enrolled to provide services to individuals eligible for the North Dakota Medicaid program

Probable Impact

The proposed amendments may impact the regulated community as follows:

- Clarify coverage of hospital-based partial hospitalization and substance use disorder treatment.
- Require additional face to face visits and documentation for home health services.
- Provide guidance for implementing oversight of psychotropic drugs for children when five or more are prescribed.

Probable Cost of Implementation

- There are no expected costs of implementation.

Consideration of Alternative Methods

There are no alternative methods that would ensure consist understanding and application of rules governing the administration of the Medicaid program. Also, the 2017 Legislative Assembly authorized rule making for home health services and approved changes for oversight of psychotropic drugs for children; therefore, 75-02-02 must be updated.

MEMORANDUM

TO: Jon Alm, Director, Legal Advisory Unit

FROM: Maggie Anderson, Director, Medical Services

DATE: September 11, 2017

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-02

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 chapter 75-02-02. Federal rules require the proposed changes to home health face to face visits.

Consistent with public health, safety, and welfare, the Department has considered using regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the rules' impact on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

The only small entities affected by these proposed amendments are small providers enrolled to provide services within the North Dakota Medicaid program. There are no stringent compliance or reporting requirements within the proposed rule changes.

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

The proposed amendments will not alter in any material way any required schedules or deadlines for compliance or reporting requirement of small enrolled Medicaid providers. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

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

The proposed amendments will not alter in any material way any required compliance or reporting requirements of Medicaid providers. For this reason, the

establishment of simplified compliance or reporting requirements for these small entities was not considered.

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

The proposed amendments do not impose any design standards or impose any additional operational standards or operational standards for enrolled Medicaid providers. 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 proposed rules do not exempt small entities from the requirements.

MEMORANDUM

TO: Jon Alm, Director, Legal Advisory Unit

FROM: Maggie Anderson, Director, Medical Services Division

DATE: September 11, 2017

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code Chapter 75-02-02

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code chapter 75-02-02.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are providers enrolled with the North Dakota Medicaid program.

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: No administrative or other costs are required by the small entities for compliance with the proposed rules.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: There are no probable cost to private persons or consumers expected for the proposed rules.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: There are no expected impacts on state revenues.

5. Alternative Methods

The Department considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. Small entities will not experience administrative costs or other costs; therefore, alternative methods were not necessary.

FISCAL IMPACT

The anticipated fiscal impact resulting from the implementation of the proposed amendments is nominal.



Doug Burgum, Governor
Christopher Jones, Executive Director


TAKINGS ASSESSMENT

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

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.
2. The purpose of this proposed rule is clearly and specifically identified in the public notice of proposed rulemaking which is by reference incorporated in this assessment.
3. The reasons this proposed rule is necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.
4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than \$0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than \$0.
5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.
6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

Dated this 11th day of September, 2017.

by: 
N.D. Dept. of Human Services