

BEFORE THE DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 37.82.102 and 37.86.104 ) PROPOSED AMENDMENT  
pertaining to Medicaid coverage of )  
abortion services )

TO: All Concerned Persons

1. On January 12, 2023, at 1:00 p.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/89568682525?pwd=WHZYMWVVOOHdpZIhiYUd3aWNzTEY0QT09>, meeting ID: 895 6868 2525, and password: 822643; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 895 6868 2525, and password: 822643. Find your local number: <https://mt-gov.zoom.us/u/kbHzPoel8>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on December 29, 2022, to advise us of the nature of the accommodation that you need. Please contact Kassie Thompson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail [hhsadminrules@mt.gov](mailto:hhsadminrules@mt.gov).

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

37.82.102 MEDICAL ASSISTANCE DEFINITIONS (1) through (18)(c) remain the same.

(d) With respect to abortion services reimbursable under the Montana Medicaid program, subsection (a) is limited by ARM 37.86.104(11).  
(19) through (35) remain the same.

AUTH: 53-2-201, 53-6-113, MCA  
IMP: 53-2-201, 53-6-101, 53-6-106, 53-6-107, 53-6-111, 53-6-113, 53-6-131, 53-6-141, MCA

37.86.104 PHYSICIAN SERVICES, REQUIREMENTS (1) through (7)(b) remain the same.

(c) In a case where the recipient is sterile before the hysterectomy or there is a life-threatening emergency that precludes the recipient from giving prior acknowledgment of receipt of hysterectomy information, the requirements in (7)(a) and (7)(b) do not apply. Instead, the physician who performed the hysterectomy either:

(i) and (ii) remain the same.

(8) Coverage of physician services for abortions is limited as follows:

(a) the life of the mother will be endangered if the fetus is carried to term; or

(b) the pregnancy is the result of an act of rape or incest; or

(c) to the extent required by statute, when an abortion is a medically necessary service, even if the abortion does not meet the standard in (8)(a) and (9).

(9) Physician services for abortions, in a case of endangerment of the mother's life, must meet the following requirements in order to receive Medicaid reimbursement:

(a) and (10) remain the same.

(11) Abortion is a medically necessary service and eligible for coverage under the Montana Medicaid program when:

(a) a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed; or

(b) although it does not place the woman in danger of death unless an abortion is performed, a woman suffers from:

(i) a physical condition that would, as certified by a physician, be significantly aggravated by the pregnancy; or

(ii) a psychological condition that would, as certified by a physician, be significantly aggravated by the pregnancy.

(12) Physician services for abortions require prior authorization. If prior authorization is not obtained, due to an emergency situation or otherwise, a claim for payment for such physician services will undergo post-service, prepayment review. The request for prior authorization or the claim for payment must be accompanied by a completed and signed Physician Certification for Abortion Services Form (MA-037 form).

(13) Supporting documentation must be submitted for abortions covered under (8)(a) or (c). The following documentation must be submitted with the prior authorization request or with any claim for payment for which prior authorization was not received to support the determination of medical necessity:

(a) History and Physical, which should include (at a minimum) as it relates to the pregnancy:

(i) medical history, including age, current medications and allergies, number of times the patient has been pregnant and number of times she has had a live birth, last menstrual period, status and results of any pregnancy test, allergies, chronic illnesses, surgeries, behavioral health issues, smoking, substance abuse, and obstetric history;

(ii) brief review of systems to identify symptoms a patient may be experiencing;

- (iii) the results of a physical examination, including vital signs, heart, lungs, abdomen, extremities, and estimate of gestational age (if imaging is not available);
  - (iv) results of laboratory tests (if available), including Rh factor, Hemoglobin, and Human Chorionic Gonadotropin;
  - (v) imaging (if available), to estimate gestational age;
  - (vi) documentation that the diagnosis of the physical or psychological condition leading to the medical necessity determination has been made by a medical professional qualified by education, training, and/or experience to make such diagnosis and that the woman is receiving care for such condition;
  - (vii) reason for the abortion procedure;
  - (viii) for medication/chemical abortions, documentation confirming review of contraindications, adequate patient education, and compliance with the requirements of the Physician-Related Services Manual;
  - (ix) treatment plan; and
  - (x) signed informed consent for the proposed abortion procedure.
  - (14) Physician services for abortions must be performed by a physician as defined in 37-3-102, MCA.
  - (15) Prior authorization is not required for treatments for incomplete abortions, miscarriages, or septic abortions.
- (11) and (12) remain the same, but are renumbered (16) and (17).

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing to amend ARM 37.82.102 and ARM 37.86.104 with respect to when Medicaid pays for abortion services provided to beneficiaries of the program.

The following summaries explain the programmatic changes and the reasonable necessity for the proposed rule amendments.

Since the 1970s, there has been a bar on the use of federal funds to pay for abortions in the Medicaid program except in certain, limited circumstances, pursuant to the Hyde Amendment. The Hyde Amendment, an annual appropriations rider on the federal appropriations act that funds the U.S. Department of Health and Human Services, imposes limits on federal funding of abortion services. Under the current version of the Hyde Amendment, abortion services provided because of rape or incest or where the life of the mother is endangered by the pregnancy, are eligible for federal funds. The Montana Medicaid program cannot use federal funds or state matching funds to pay for abortions performed for any other reason.

Rules promulgated by the Montana Department of Social and Rehabilitation Services sought to limit Medicaid coverage of abortion services to those situations in which federal financial participation was available – i.e., those abortions subject to one of the Hyde Amendment exceptions. These rules were challenged in *Jeannette*

*R. v. Ellery*, No. BDV-94-811 (1st Jud. Dist., Lewis and Clark County). There, the district court noted that, under the MCA, the Montana Medicaid program was established for the purpose "of providing necessary medical services to eligible persons who have need for medical assistance." *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795, \*14 (1st Jud. Dist., May 22, 1995). The court concluded that the "statute does not give the Department the authority to limit or eliminate those services enumerated under Section 53-6-101(2), MCA, unless there are insufficient funds to provide medical assistance for all eligible people." *Id.* at \*16. Although another MCA provision directed the department to administer the program in accordance with the federal Medicaid statutes, the court said that such provision "is intended to tell the Department to make sure that the program provides at least those services included in Title XIX [the federal Medicaid Act] and to provide them in the manner directed by Title XIX. It does not tell the Department to limit those services to only those within Title XIX." *Id.* at \*16-17.<sup>1</sup> The court stated that "[t]he legislature can pass its own Hyde Amendment if it wishes. However, it exceeds the power of the Department for it to limit the services provided by the legislature." *Id.* It, thus, concluded that the department had a statutory obligation to pay for medically necessary abortions in the Montana Medicaid program.<sup>2</sup> The court emphasized that its decision "does not conclude that the state of Montana must fund elective, nontherapeutic abortions." *Id.* at \*28; *see also Id.* at \*4 ("this case has nothing to do with indigent women who may seek an elective abortion. . . . Not at issue are nontherapeutic elective abortions. In other words, this case has nothing to do with abortions that are not medically necessary, as that determination is made by a physician.").

Following the decision in *Jeannette R.*, the department has covered abortion services where a physician has determined the procedure to be medically necessary. Because of the Hyde Amendment, these abortion services are funded by state general funds only. When Medicaid payment is sought for abortion services, the Montana Medicaid program requires the submission of the MA-037 form, Montana Healthcare Programs Physician Certification for Abortion Services, in addition to the claim form. The form provides three options for certification by the physician performing the abortion to support Medicaid coverage of the abortion: (1) the abortion is necessary to save the member's life; (2) the pregnancy resulted from rape or incest; or (3) the abortion is medically necessary, but the member's life is not endangered, with space to provide an optional explanation. The form does not require the submission or attachment of additional documents for any of the three options for Medicaid coverage certification.

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<sup>1</sup> Case law, including a decision by the *Jeannette R.* court, has held that state Medicaid programs have to cover all abortions covered by federal Medicaid.

<sup>2</sup> While acknowledging that he did not need to reach the issues, the district court also concluded that the regulations violated the Montana Constitution's privacy and equal protection provisions. However, there is good reason to believe that such rulings are mere dicta under principles of constitutional avoidance.

The 2021 Montana Legislature directed the department to review and report on the history, utilization data, policies, rules, and definitions for Medicaid-reimbursed abortions. See H.B. 2. During the September 2021 meetings of the Interim Budget Committee for Section B and the Children, Families, and Health and Human Services Interim Committee, the department presented a summary of current laws, rules, policies, procedures, and claims estimates associated with Medicaid-reimbursed abortions titled "Abortion Services and Montana Medicaid." The Interim Committees requested that the department conduct an in-depth review of abortion claims paid by Montana Medicaid, as well as a legal review of the current state of the law concerning Medicaid-reimbursed abortions. As a result of this request, the department, using the services of a contractor, reviewed all Medicaid-reimbursed abortions for which the department claimed federal financial participation for the 10-year period, July 2011 – June 2021 (6 abortions), as well as 10% of the abortions paid for by Montana Medicaid, using only state funds, based on medical necessity for the 3-year period, July 2019 – June 2021 (79 claims for SFY 2019, 67 claims for SFY 2020, and 75 claims for SFY 2021). In September 2022, the department presented the results of this analysis of Montana Medicaid-funded abortion services to the Interim Budget Committee for Section B. The analysis concluded that the information submitted on or with the MA-037 form lacks sufficient information to support medical necessity. With respect to medically necessary abortions, the department's contractor reported that the MA-037 forms contained a brief narrative, but only 11.31% (25 claims, submitted by one provider), contained additional documentation. Such additional documentation typically correlated with the vague medical condition of "complications of unintended pregnancy," or an assessment of the situation, rather than documentation to support an actual complication or disease, other than the pregnancy itself. The four conditions routinely indicated on the MA-037 form were (1) pain and suffering (47.5%); (2) emotional stability (24.43%); (3) mental and physical health (9.05%); and (4) complications of unintended pregnancy (19.00%). Ninety claims reviewed related to medication/chemical abortions, but only 10 of such claims included documentation that established that the requirements of the Physician-Related Services Manual for such abortions were met.

The department's contractor recommended that Medicaid-funded abortion claims should be supported by documentation, including a brief history and physical examination with evidence of the medical diagnosis and/or condition necessitating abortion, an estimate of gestational age, and corroborating laboratory and imaging studies that support the medical diagnosis or patient condition, with such additional information being submitted on (or with) the MA-037 form.

The results of the in-depth review of Medicaid-reimbursed abortion claims have caused the department grave concern:

- If Medicaid-reimbursed abortion claims were audited, by the federal government or otherwise, the department would not have sufficient documentation to support that the abortions meet the criteria for payment by

the Medicaid program, regardless of whether federal financial participation is available pursuant to the Hyde Amendment.

- With respect to medically necessary abortions, funded only by State general fund: The consistent lack of documentation, coupled with the conditions routinely provided on the MA-037 forms as the basis for medical necessity, lead the department to reasonably believe that the Medicaid program is paying for abortions that are not actually medically necessary, but are, in fact, elective, nontherapeutic abortions.

Faithfulness to the scope of the Medicaid program as established by the legislature and to Montana taxpayers and the state funds justifies the department's decision to require the submission of documentation to support Medicaid payment for abortion services and, with respect to abortion, to provide greater specificity as to what constitutes medically necessary services and the documentation needed to support such abortion payment claims, as set forth in further detail below. Such requirements are not uncommon and are applied to other Medicaid-reimbursed services to ensure program integrity.

37.82.102(18)(d)

As indicated above, the department proposes to provide greater specificity as to what abortions constitute medically necessary services. So that all of the rules concerning Medicaid coverage of abortion services are located in one rule, the department proposes to include, in the definition of "medically necessary services" in this rule, a cross reference to ARM 37.86.104 where the department proposes to provide such greater specificity.

37.86.104(7)(c), (9)

The department proposes to make minor, non-substantive punctuation changes to these provisions.

37.86.104(8)

ARM 37.86.104(8) identifies the situations in which the Montana Medicaid program covers abortion services for Medicaid beneficiaries. The rule currently lists those covered by the Medicaid program as a result of the Hyde Amendment: where the pregnancy endangers the life of the mother or where the pregnancy results from rape or incest. The department proposes to amend this provision to indicate that, when the Montana Medicaid statute requires it (as the district court in *Jeannette R.* held that the statute currently does), the Montana Medicaid program also covers medically necessary abortions even if the life of the mother is not endangered. This is merely a codification of current practice by the Montana Medicaid program as a result of the decision in *Jeannette R.*

37.86.104(11)

As noted above, the Montana legislature established the Montana Medicaid program "for the purpose of providing necessary medical services to eligible persons who have need for medical assistance." 53-6-101, MCA. The district court in *Jeannette R.* determined that this required coverage of medically necessary abortions even

where the life of the mother would not be endangered if the pregnancy was carried to term. The court, however, stated that "[i]t is clear that the state need not fund nontherapeutic, elective abortions." To ensure that the Medicaid program is only covering medically necessary abortions, not providing payment for abortions that are, essentially, elective, nontherapeutic abortions, and using appropriate funds, the department proposes to provide greater specificity as to when an abortion is medically necessary. Namely, the department proposes that abortion is a medically necessary service and eligible for coverage under the Montana Medicaid program when: (a) a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed; or (b) although it does not place the woman in danger of death unless an abortion is performed, a woman suffers from a physical or psychological condition that would, as certified by a physician, be significantly aggravated by the pregnancy. The department proposes to further strengthen the requirement of medical necessity by requiring, in ARM 37.86.104(13), documentation that the woman was diagnosed with the condition by a medical professional qualified by education, training, and/or experience to make such a diagnosis and that she is being treated for such condition.

37.86.104(12)

Beginning with abortion services provided on or after the effective date of the final rule, the department proposes to require prior authorization on abortion services to ensure covered services are consistent with the Hyde Amendment (where the pregnancy endangers the life of the mother or the pregnancy results from rape or incest), or are medically necessary and the appropriate funds are utilized. Requests for authorization must be submitted electronically to the department's contracted Quality Improvement Organization through the Qualitrac Portal. The department recognizes, however, that there may be instances where a physician seeks Medicaid reimbursement for abortion services where – as a result of an emergency situation or otherwise – prior authorization was not obtained. In such circumstances, the department proposes to require post-service, prepayment review of the claim for payment for the abortion service for the same reasons. The department further proposes that any request for prior authorization or any claim for payment for abortion services that did not receive prior authorization be accompanied by a completed and signed MA-037 form.

The department notes that it is not unusual for prior authorization to be required for certain services. While the department has exercised its discretion and is not enforcing certain prior authorization requirements during the COVID-19 public health emergency, prior authorization is required for Medicaid coverage of a large number of medical services and medical products, including:

- Wheel chairs.
- Hearing aids.
- Physician administered drugs, such as Sublocade, a medication for opioid use disorder.

- Breast augmentation.
- Transcranial magnetic stimulation, a procedure for treatment resistant depression.
- Out of state inpatient hospital stays.

It is the department's practice to require prior authorization especially when there may be questions as to whether the service is medically necessary. For example, as provided in ARM 37.86.104(3), prior authorization is required for physician services for conditions or ailments that are generally considered cosmetic in nature. With respect to such services, the department requires prior authorization (and limits Medicaid coverage to such cases "where it can be demonstrated that the physical and psycho-social wellbeing of the recipient is severely affected in a detrimental manner by the condition or ailment").

Here, in order to ensure that Montana Medicaid is only paying for abortions where required by federal or state statutory law – and, thus, is not paying for elective, nontherapeutic abortions consistent with case law – the department proposes to require prior authorization or post-service, prepayment review of claims for such services.

#### 37.86.104(13)

Where Medicaid payment is sought for an abortion based on medical reasons – whether the physician concludes that the life of the mother will be endangered if the unborn child is carried to term or that the abortion is otherwise medically necessary – the department proposes to require certain clinical documentation, in addition to the completed and signed MA-037 form, in order to document and justify the physician's conclusion and support appropriate reimbursement.<sup>3</sup>

The department proposes to require documentation of the woman's medical history and physical condition, including (1) medical history; (2) brief review of systems to identify symptoms a patient may be experiencing; (3) the results of a physical examination, including estimate of gestational age (if imaging is not available); (4) results of laboratory tests (if available); (5) imaging (if available), to estimate gestational age; (6) documentation that the diagnosis of the physical or psychological condition leading to the medical necessity determination has been made by a medical professional qualified by education, training, and/or experience to make such diagnosis and that the woman is receiving care for such condition; (7) reason for the abortion procedure; (8) for medication/chemical abortions, documentation confirming review of contraindications, adequate patient education,

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<sup>3</sup> The department is not proposing to require documentation in addition to the completed and signed MA-037 for abortions in which Medicaid coverage is sought because the pregnancy is a result of rape or incest. However, the department will closely monitor such claims and take appropriate action if the number of claims for coverage of abortion because of rape or incest spikes after the proposed changes are adopted and implemented and the rates for such abortions exceed historical rates.



and compliance with the requirements of the Physician-Related Services Manual; (9) treatment plan; and (10) signed informed consent for the proposed abortion procedure.

The department proposes to require this level of documentation because it is consistent with the level of recordkeeping required as a condition for coverage under U.S. Centers for Medicare & Medicaid Services rules for procedures carried out at ambulatory surgical centers and is the minimum standard documentation that would normally be requested with respect to procedures if a determination of medical necessity is to be made. The department proposes to require documentation that the diagnosis of the physical or psychological condition leading to the medical necessity determination has been made by a medical professional qualified by education, training, and/or experience to make such diagnosis and that the woman is receiving care for such condition. This proposed requirement would help ensure the accuracy of the diagnosis on which the conclusion of medical necessity rests and, thus, provide assurance that the Montana Medicaid program is not paying for elective, non-therapeutic abortions.

The proposed documentation would also establish that the safety and wellbeing of the female patient has been considered. The assessment, including physical examination and imaging (with a determination of gestational age) is especially important when medication/chemical abortions are being performed.

As with the proposed requirement for prior authorization or post-service, prepayment review, it is not unusual for the department to require providers to submit additional documentation, clinical or otherwise, to support their claim that particular services are covered by Medicaid and that the particular claim should be paid. For example, the department requires the submission of documentation to support claims for Medicaid payment of the following services:

- Targeted case management.
- Out-of-state inpatient hospital stays.
- Certain prescription medications.
- Orthodontia.
- Hearing aids.
- Ambulance transports.
- Botox injections.

37.86.104(14)

States cannot claim federal financial participation for abortion services unless a physician certifies in writing that, in their professional opinion, the life of the mother would be endangered if the pregnancy were carried to term, or that the abortion is necessary as a result of rape or incest. 42 C.F.R. § 441.201 defines physician as a doctor of medicine or osteopathy who is licensed to practice in the state. To ensure compliance with 42 CFR Part 441 (Subpart E – Abortions), the department proposes

to limit abortion services to those services rendered by a physician as defined in 37-3-102, MCA.

The department recognizes that there is ongoing litigation on whether medical practitioners other than physicians may lawfully perform abortions in the State of Montana. That is a different issue than whether the abortion is eligible for coverage and payment under the Montana Medicaid program. To comply with federal and state statutes, to protect the integrity of the Medicaid program, and to protect the health and safety of Medicaid beneficiaries, the Medicaid program can limit Medicaid payment to services provided by certain types of health care providers.

37.86.104(15)

The requirements outlined in ARM 37.86.104(12) through 37.86.104(14) do not apply to treatment for incomplete abortions, miscarriages, or septic abortions.

Fiscal Impact

The department estimates that the proposed rule amendments will result in additional state fund expenditures in costs for utilization review of prior authorization or post-service, prepayment review documentation. The department believes that such expenditures are necessary to ensure that the Montana Medicaid program only covers abortion services where required by federal or state law and that it is not covering elective, nontherapeutic abortions.

The proposed rule amendments would preclude mid-level providers from providing abortion services. The department anticipates cases previously handled by mid-levels will shift to physicians, whose reimbursement rate is higher than mid-levels, slightly increasing costs to the department.

5. The proposed rule changes are intended to be effective upon the day after the date of publication of the adoption notice.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kassie Thompson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail [hhsadminrules@mt.gov](mailto:hhsadminrules@mt.gov), and must be received no later than 5:00 p.m., January 20, 2023.

7. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless

a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above.

9. An electronic copy of this notice is available on the department's web site at <https://dphhs.mt.gov/LegalResources/administrativerules>, or through the Secretary of State's web site at <http://sosmt.gov/ARM/register>.

10. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will significantly and directly impact small businesses.

There are two clinics with fewer than 50 full-time employees that provide abortions in Montana for which reimbursement is sought from the Montana Medicaid program. The probable impact of the proposed rule amendments will require additional time for the clinic to provide the necessary prior authorization/post-service, prepayment review documentation and require the clinic to use physicians to provide Medicaid-reimbursed abortion services, rather than mid-level practitioners. There are no alternative methods that may be reasonably implemented to minimize or eliminate the effects of adopting the proposed rule changes.

12. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

/s/ PAULA M. STANNARD  
Paula M. Stannard  
Rule Reviewer

/s/ CHARLES T. BRERETON  
Charles T. Brereton, Director  
Department of Public Health and Human  
Services

Certified to the Secretary of State December 13, 2022.