

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.40.1402 and 37.40.1435)
pertaining to HCBS adult residential)
care services)

TO: All Concerned Persons

1. On July 26, 2024, the Department of Public Health and Human Services published MAR Notice No. 37-1078 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1793 of the 2024 Montana Administrative Register, Issue Number 14.

2. The department has amended ARM 37.40.1402 as proposed.

3. The department has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.40.1435 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: ADULT RESIDENTIAL CARE, REQUIREMENTS (1) through (3)(a)(iv) remain as proposed.

(v) all staff providing direct services to members receiving level 2 services must receive eight hours of mandatory training annually that is specific to the needs and diagnosis of the member receiving support. Trainings must be documented, and training records must be available for inspection by the department upon request; and

~~(v) the facility must make available or directly provide a minimum of eight hours of training to staff who interact with members that is specific to the condition(s) of the member(s) for which level 2 services are being requested or are authorized; and~~

(vi) all staff providing direct services to members receiving level 2 services must also receive eight hours of mandatory training annually ~~To support assisted living facility staff who interact with members who exhibit adverse behaviors, the facility must also make available or directly provide to these staff members a minimum of 16 hours of in-service training, annually, in the areas of traumatic brain injury, spectrum disorders, substance abuse, dementia/Alzheimer's, and other conditions which may be associated with behavioral issues. Trainings must be documented, and training records must be available for inspection by the department upon request.~~

(b) through (14) remain as proposed.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA
IMP: 53-6-402, MCA

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter recommended that level 2 services be made available in Category D assisted living facilities because there is currently no rate in the Big Sky Waiver fee schedule for services provided in Category D assisted living facilities.

RESPONSE #1: The department appreciates the suggestion that level 2 services be made available in Category D assisted living facilities. There are currently no licensed Category D assisted living facilities in Montana. The department does not believe that level 2 services would provide an appropriate rate for Category D assisted living facilities.

COMMENT #2: A commenter recommended revising ARM 37.40.1435(3) to remove language requiring disruptive behaviors to occur four or more times per week. Alternatively, the commenter recommended the rule be clarified to provide that disruptive behaviors remaining under control because of additional efforts/services by a facility do not have to continue to occur four times per week to qualify for level 2 services. The commenter believes the rule language proposed by the department appears to punish facilities who are able, through additional efforts, to control the behaviors and improve the quality of life for the resident.

RESPONSE #2: The department appreciates the commenter's concerns. The department refers the commenter to ARM 37.40.1435(3)(b), which provides: "Level 2 services may be approved on a temporary or long-term basis depending on the individual members circumstances and/or actual outcomes." The department's intent is for members to be provided continued support through level 2 services as long as they remain necessary. The department recognizes that some members will require long-term level 2 services. The department is also developing written guidance to provide facilities more detailed information regarding the process for requesting continuing level 2 services. The written guidance policies will be made publicly available on the department's website once finalized.

COMMENT #3: Multiple commenters recommended that ARM 37.40.1435 be amended to more clearly define the prior authorization process and the time frame in which prior authorization requests will be determined to ensure delays are minimal. One of these commenters also questioned how the appeal process will work in the event the department denies a provider's prior-authorization request for level 2 services.

RESPONSE #3: The department notes these stated concerns regarding timely authorization of level 2 services. The department recognizes the urgency of authorizing level 2 services to ensure members are being appropriately supported. Written guidance is being developed to ensure timely processing of level 2 prior

authorizations and will be made publicly available on the department's website once finalized. Additionally, timelines for approval or denial of prior authorizations will also be clearly defined in the contractual agreement with the Quality Improvement Organization to ensure timely processing of prior authorization requests. The appeal process for denial of a request for level 2 services would be subject to the department's rules governing fair hearings and contested case proceedings under ARM Title 37, chapter 5.

COMMENT #4: A commenter expressed concern that the proposed language in ARM 37.40.1435(3)(a)(ii) would not allow an assisted living facility to accept a member from a home or other provider with assurance that the level 2 rate will apply. The commenter recommended that the rule be revised to allow the department to consider the individual's history of behaviors at home or in another placement/facility (including the state hospital).

RESPONSE #4: The department notes the commenter's stated concerns regarding the acceptance of individuals into an assisted living facility without assurance of receiving the level 2 rate. The department believes the rule language as proposed is necessary for the assisted living facility to assess the member in the new facility setting to determine if the change in environment results in elimination or reduction of the occurrence of disruptive behaviors. The initial 30-day period under ARM 37.40.1435(3)(a)(ii) also provides the facility with necessary time to develop a plan to meet the member's needs. This assessment, along with any historical information, will serve as supporting documentation when requesting level 2 services.

COMMENT #5: A commenter recommended that ARM 37.40.1435(3)(a)(iv) be revised to allow the department to consider the individual's history of behaviors at home or in another placement/facility (including the state hospital) and any interventions used. The commenter indicated the department's proposed rule language would not allow an assisted living facility to accept a member from a home or another provider with assurance that the level 2 rate will apply.

RESPONSE #5: ARM 37.40.1435(3)(a)(iii) and (iv) list the supporting documentation which is used as part of the prior authorization process for level 2 services. The facility's assessment of the member in the new facility setting, as well as a history of previous behaviors, will provide support for the request of level 2 services and aid in the development of a support plan for the member. Please also see the response to comment #4.

COMMENT #6: A commenter recommended that ARM 37.40.1435(3)(a)(v) be revised to clarify the meaning of "make available." The commenter indicated a facility can make available training, but staff might not take advantage of the training. The commenter indicated if the intent is for staff to have eight hours of training (regardless of whether directly provided by the facility) this should be made clear in the rule.

RESPONSE #6: The department appreciates the commenter's suggestion and has revised the rule to clarify the intent is for all staff providing direct services to member(s) receiving level 2 supports to complete eight hours of training annually specific to the needs and diagnosis of the member(s).

COMMENT #7: A commenter expressed concern regarding the appropriateness of the training required under ARM 37.40.1435, how the trainings are provided, the type of trainings available, timing of the trainings, and who would be required to receive training. The commenter also expressed their support of the importance of staff training.

RESPONSE #7: The department thanks the commenter for their support of staff training and appreciates the commenter's feedback. The department has revised ARM 37.40.1435(3)(a)(vi) to clarify the intent is for the training requirement to apply to all staff providing direct services to members receiving level 2 services. The department has also revised the rule to require eight hours instead of 16 hours of training annually in general areas that will improve the ability of staff to work with and support members receiving level 2 services. The rule provides facilities with flexibility to identify which general trainings related to conditions associated with behavioral issues will be most appropriate for staff supporting members receiving level 2 services. Additionally, the rule allows for the format of the training to be at the discretion of the facility.

COMMENT #8: A commenter expressed the need for facilities to adhere to the federal HCBS settings requirements and the Americans With Disabilities Act (ADA).

RESPONSE #8: The department appreciates and agrees with the commenter's remarks. The requirement to comply with federal HCBS settings regulations and the ADA are addressed in other Big Sky Waiver administrative rules and Montana's approved waiver application.

COMMENT #9: A commenter pointed out that many behaviors are associated with disabilities and disabled members should not be subjected to punitive actions because of those behaviors. The commenter indicated that the focus of the level 2 services should be to only address disruptive behaviors that may cause health and safety risk to the member, staff, or other residents.

RESPONSE #9: The department agrees that members with disability-related behaviors should not be subjected to punitive actions because of those behaviors. Level 2 services are intended to positively support members exhibiting disruptive behaviors so that they can receive appropriate services and maintain placement in an assisted living environment. Members must consent to level 2 services and may choose to discontinue level 2 services at any time.

COMMENT #10: A commenter expressed support of the level 2 services to aid assisted living facilities in supporting members with behavioral issues.

RESPONSE #10: The department thanks the commenter for their support.

COMMENT #11: A commenter expressed concern regarding the specialized training requirements under ARM 37.40.1435.

RESPONSE #11: Please see the response to comment # 7.

/s/ Robert Lishman
Robert Lishman
Rule Reviewer

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

Certified to the Secretary of State September 10, 2024