

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 37.40.1402 and 37.40.1435) PROPOSED AMENDMENT
pertaining to HCBS adult residential)
care services)

TO: All Concerned Persons

1. On August 16, 2024, at 10:00 a.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/81555134342?pwd=dnFIMUttRIB6cGpTNktCMFRpNEFzUT09>, meeting ID: 815 5513 4342, and password: 316296; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 815 5513 4342, and password: 316296. Find your local number: <https://mt-gov.zoom.us/u/kewP3SViiv>.

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 August 2, 2024, to advise us of the nature of the accommodation that you need. Please contact Bailey Yuhas, 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.

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

37.40.1402 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSON: DEFINITIONS (1) "Adult residential care" means a residential habilitation option for consumers residing in an adult foster home, group home ~~a residential hospice~~, or an assisted living facility.
(2) through (24) remain the same.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

37.40.1435 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: ADULT RESIDENTIAL CARE, REQUIREMENTS (1) ~~Adult residential care is a residential habilitation option for~~

consumers residing in an adult foster home, a residential hospice, or an assisted living facility.

(1) Adult residential care services consist of the following categories: level 1 services, level 2 services, level 3 services, and group home services.

(2) Level 1 services are available in licensed adult foster care homes and licensed assisted living categories A, B, and C.

(3) Level 2 services are available in assisted living categories A, B, and C. Level 2 services consist of behavior management support services and include an enhanced rate to reimburse facilities for added supports for members who have disruptive behaviors associated with a medical diagnosis that occur four or more times per week.

(a) The following requirements apply to level 2 services:

(i) the services must be pre-authorized by the department;

(ii) the member must have received level 1 services for at least the past 30 days;

(iii) the facility must submit to the department a member-focused summary outlining the proposed plan of care to which the services will be applied;

(iv) the facility must provide documentation of past attempts to remedy the member's disruptive behavior that includes, at a minimum, the member's assisted living service plan, progress notes, charting, and any other applicable/relevant medical records;

(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) 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) Level 2 services may be approved on a temporary or long-term basis depending on the individual member's circumstances and/or actual outcomes.

(c) Assisted living facilities providing specialized adult residential services and group homes are not eligible for the level 2 enhanced rate as reimbursement for behavioral support services is covered under the level 3 and group home rates.

(4) Level 3 services are specialized adult residential care services provided in licensed assisted living categories A, B, and C facilities that specialize in the care of individuals with brain injuries or other severe physical disabilities.

(5) Group home adult residential care services are provided in licensed community homes for persons with physical disabilities.

(6) Adult residential care services provided in a category B or C assisted living facility must be pre-authorized by the department.

(7) Adult residential care services must be provided using a person-centered planning process in accordance with 42 CFR 441.725, as amended May 10, 2024, which the department adopts and incorporates by reference. A copy of this federal

regulation may be obtained from the Department of Public Health and Human Services, Senior and Long Term Care Division, 1100 N. Last Chance Gulch, P.O. Box 4210, Helena, MT 59604-4210 or by visiting <https://www.ecfr.gov/>.

~~(2)~~(8) Adult residential care is a bundled service that may includes:

(a) through (d) remain the same.

(e) medication ~~oversight~~ monitoring and management; and

(f) assistance in arranging ~~transportation~~ for medical care and non-medical transportation.

~~(3)~~(9) Adult residential care must provide for 24-hour on-site response staff to meet members' scheduled or unpredictable and unscheduled needs of consumers and to provide supervision of consumers for safety and security.

~~(4)~~(10) A consumer recipient of adult residential care may not receive the following services through the program:

(a) through (e) remain the same.

(5) and (6) remain the same but are renumbered (11) and (12).

~~(7)~~ An assisted living facility providing adult residential services must have the following features:

~~(a) Provide a home-like environment in either:~~

~~(i) an apartment style living unit with a bedroom, easy access to a bath, and cooking areas; or~~

~~(ii) a home style living unit with a bedroom, easy access to a bath, and reasonable access to food and beverages, unless against medical advice.~~

~~(b) Small dining areas or ability to eat with a private party.~~

~~(c) Residents must have control of lockable access to living unit and egress from the facility (unless Category C). The facility may have a master key for emergencies.~~

~~(d) Residents must have the ability to furnish and decorate living unit.~~

~~(e) Access to private areas for telephone and visitors.~~

~~(f) Provide reasonable assistance coordinating and arranging for the resident's choice of community pursuits outside the residence. This is in addition to the regular outings provided by the facility.~~

~~(g) Residents must have reasonable access to unscheduled activities and resources in the community.~~

~~(h) Policies and practices allow resident risk, through family and resident education, risk assessment, and negotiated risk agreement.~~

~~(i) Aging in place must be a common practice of the assisted living facility, within scope of license.~~

~~(j) The facility should make concerted efforts to allow consumers to remain in the facility when changing from private pay to waiver funding.~~

~~(k) Education and documentation of the facility policies around room changes needs to have been given and explained to the consumer prior to admission and reviewed as financial status changes.~~

~~(8) Providing waiver funding for adult residential services in assisted living facilities that do not meet the above criteria is not allowed.~~

~~(9) Effective September 1, 2011, Medicaid funding will no longer be available for newly admitted home and community services consumers in an assisted living facility, unless the facility meets the above criteria.~~

(13) Provider owned or leased settings where Home and Community-Based services are furnished must be compliant with the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

(14) The department may authorize retainer payments, billed at the facility provider rate when the member is absent from an adult residential care facility due to hospitalization, admission to a nursing facility, or vacation (absence from services), for a period not exceeding 30 days per service plan year subject to the following conditions:

(a) The facility may not bill Medicaid for services on days the member is absent from the facility unless retainer-day payments have been pre-authorized by the resident's case management team.

(b) The facility may bill for the date of admission to and discharge from a hospital or nursing facility.

(c) If the member is transferring from one residential care setting to another, the discharging facility may not bill for the day of transfer.

(d) Retainer payments may not be used while a member resides in the Montana State Hospital.

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

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) proposes to amend ARM 37.40.1402 and 37.40.1435 pertaining to adult residential care services. The department is proposing to amend ARM 37.40.1402 to remove residential hospice as an adult residential care service and to add group homes as an adult residential care service. This proposed rule change is necessary to remove outdated rule language and reflect current practice under which residential hospice is reimbursed through a separate fee schedule in accordance with ARM 37.40.830.

The department is also proposing to amend ARM 37.40.1435 to clarify the different categories of residential care services, requirements for these services, and to reflect the addition of level 2 services that were approved by the Centers for Medicare & Medicaid Services in the 1915(c) April 2022 Big Sky Waiver renewal. The level 2 service rate is currently established in the Big Sky Waiver Fee Schedule.

The department is proposing the addition of minimum staff training requirements that must be fulfilled for a facility to be eligible for reimbursement at the level 2 service rate. These minimum staff training requirements are intended to ensure that assisted living facilities make available or directly provide training to staff on how to appropriately interact and support individuals who have diagnoses associated with disruptive behaviors. Appropriate staff reaction to an individual who is exhibiting adverse behaviors due to a medical condition can deescalate situations affecting the safety of the member, other residents, and facility staff.

Level 2 residential care services are intended to provide support for members currently living in an assisted living facility who are exhibiting adverse behaviors and whose placement is determined to be at-risk due to those identified behaviors. The proposed rule changes set forth the criteria that must be met by assisted living facilities seeking level 2 service approval. Also included in these proposed rule changes is the addition of language allowing for retainer payments when a member is absent from an adult residential care facility due to hospitalization, entry to a nursing facility, or vacation (absence from services) for a period of up to 30 days per service plan year.

Fiscal Impact

An estimated 104 members may qualify for level 2 services. Eligibility for level 2 services includes the requirement for a member to have first received adult residential care level 1 services for at least 30 days. Level 1 services are currently reimbursed at the rate of \$118.50 per day, while level 2 services are currently reimbursed at the rate of \$146.64 per day, a difference of \$28.14 per day. This equates to an additional \$844 per month, or \$10,130 per year, for each member who qualifies for level 2 services.

5. 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: Bailey Yuhas, 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, and must be received no later than 5:00 p.m., August 23, 2024.

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

7. 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 5 above.

8. 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 rules.mt.gov.

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

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

11. 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/ 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 July 16, 2024.