

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 37.85.104, 37.85.105, and)
37.85.106 pertaining to updating)
Medicaid and non-Medicaid provider)
rates, fee schedules, and effective)
dates)

TO: All Concerned Persons

1. On June 11, 2021, the Department of Public Health and Human Services (department) published MAR Notice No. 37-944 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 687 of the 2021 Montana Administrative Register, Issue Number 11.

On July 9, 2021, the department published an amendment to MAR Notice No. 37-944 pertaining to a second public hearing and extension of comment period on the proposed amendment of the above-stated rules at page 853 of the 2021 Montana Administrative Register, Issue Number 13.

2. The department has amended the following rules as originally proposed: ARM 37.85.104 and 37.85.106.

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

37.85.105 EFFECTIVE DATES, CONVERSION FACTORS, POLICY ADJUSTERS, AND COST-TO-CHARGE RATIOS OF MONTANA MEDICAID PROVIDER FEE SCHEDULES (1) remains as proposed.

(2) The department adopts and incorporates by reference, the resource-based relative value scale (RBRVS) reimbursement methodology for specific providers as described in ARM 37.85.212 on the date stated.

(a) through (h) remain as proposed.

(i) Optometric services receive a ~~114.79%~~ 117.50% provider rate of reimbursement adjustment to the reimbursement for allied services as provided in ARM 37.85.105(2) effective ~~July 1, 2024~~ July 1, 2020.

(j) and (k) remain as proposed.

(3) The department adopts and incorporates by reference, the fee schedule for the following programs within the Health Resources Division, on the date stated.

(a) through (s) remain as proposed.

(t) The optometric services fee schedule, as provided in ARM 37.86.2005, is effective ~~July 1, 2024~~ January 1, 2021. The optometric services fee schedule does

not incorporate the July 1, 2021 proposed amendments to (2)(a) through (i), (3)(k), and (3)(v), as proposed in MAR Notice No. 37-944.
(u) through (6) remain as proposed.

AUTH: 53-2-201, 53-6-113, MCA, MCA
IMP: 53-2-201, 53-6-101, 53-6-125, 53-6-402, MCA

4. For reasons set forth below, the department has removed from the adoption notice portions relating to optometric rate changes, policy adjustors, and rate of reimbursement percentage.

The department has fully considered written and oral submissions respecting the proposed amendments that are the subject of this rule notice. The principal reasons for the adoption of the amendments are to incorporate the legislatively approved provider rate increases, adopt updates to the federal register for the Resource-Based Relative Value Scale reimbursement methodology, adopt policy adjustors for certain services to offset the Medicare increases in the Relative Value Units, and adopt provider rate of reimbursement percentages to ensure that the department stays within the legislative appropriation for Medicaid services. Additional justification for adoption of the amendments can be found in the statement of reasonable necessity in the Notice of Public Hearing on Proposed Amendment and in the Notice of Public Hearing and Extension of Comment Period on Proposed Amendment. The department received several comments in support of the provider rate increases. The department also received and responded to comments that were neither in favor nor opposed to the rule notice but asked questions about specific provisions, including the maternity policy adjustor changes to which the department responded below.

In addition to comments supporting the proposal, the department received comments against adoption of the rule notice. In response to commenters requesting rate increases greater than the 1% approved by the legislature, the department responded that it must stay within the legislatively approved appropriation for Medicaid services.

Because substantial differences exist between the rule amendments as proposed and as adopted with respect to one discrete set of services, the department now explains why it removed portions of the notice pertaining to that discrete set of services, namely optometry services. The principal reason for removing these provisions is due to a disagreement on the intent of the optometric service changes. By removing these changes, the department is able to work with optometric providers on the proposed amendments to optometric service rates, while allowing all other provider rate changes to be implemented. The department will, thus, engage in a separate rulemaking to make any appropriate adjustments to optometric service rates, and anticipates that such adjustments would be retroactive to July 1, 2021.

Additionally, the Children, Families, Health, and Human Services Interim Committee lodged an objection to the portion of the rule notice pertaining to optometry services. The interim committee originally lodged a general objection to the rule notice on July 6, 2021, and renewed its objections in subsequent meetings, with the final objection relating to portions of the rule pertaining to optometry services. The interim committee's objections have delayed the final adoption of the Medicaid provider rate increases, and the longer the delay remains in effect, the greater the burden on the department to implement the rate increase retroactive to July 1, 2021, the start of the state fiscal year and when provider rate changes take effect.

The department intends to meet with representatives from the optometric providers in an effort to reach an understanding about the rates of reimbursement for optometry services for the current fiscal year.

The comments received by the department are summarized and responded to below.

COMMENT #1: The department received several comments requesting a rate increase greater than the 1% approved by the Montana 2021 Legislature.

RESPONSE #1: The department proposed rate increases pursuant to the provider rate increases provided for in House Bill 2.

COMMENT #2: Comments were received expressing concern with the maternity policy adjustor changes.

RESPONSE #2: The department appreciates the feedback. The adjustment of the maternity policy adjustor is necessary to meet legislative appropriations for Medicaid.

COMMENT #3: Several comments were received supporting the legislatively approved provider rate increases.

RESPONSE #3: The department appreciates the support.

COMMENT #4: The department received 19 comments from optometrists and the Montana Optometric Association stating that optometrists should receive the same amount of reimbursement as ophthalmologists (medical doctors and doctors of osteopathy) for performing the same services. Many of the commenters stated the department does not follow 37-10-104, MCA, in reimbursing optometrists and asserted the department is illegally discriminating against optometrists.

RESPONSE #4: This issue is being litigated in the Montana Eighth Judicial District Court, Cascade County, in the matter of *Vincent, Benner and Hoch v. State of Montana, Montana Department of Public Health and Human Services*, Cause No. CDV-19-0314, which was filed by plaintiffs in May 2019. The department has responded to this lawsuit, and the district court will decide the issue.

COMMENT #5: Several optometrists opposed the proposed rule amendments and stated that the department failed to demonstrate how the proposed rule amendments represented an increase in rates of reimbursement for optometrists. One commenter said the proposed rule is inconsistent with legislative intent.

RESPONSE #5: The department disagrees with these assertions and has removed the optometric services changes from this rule filing to allow the department and optometric providers to further discuss the proposed changes.

5. The department intends to apply these rules retroactively to July 1, 2021. A retroactive application of the proposed rules does not result in a negative impact to any affected party.

/s/ Brenda K. Elias
Brenda K. Elias
Rule Reviewer

/s/ Adam Meier
Adam Meier, Director
Public Health and Human Services

Certified to the Secretary of State September 28, 2021.