

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

In the matter of the adoption of New Rule I pertaining to health emergency waiver)
NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION)
)

TO: All Concerned Persons

1. On October 28, 2021, at 2:00 p.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed adoption of the above-stated rule. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/84546337141>, meeting ID: 845 4633 7141; or

(b) Dial by telephone +1 646 558 8656, meeting ID: 845 4633 7141. Find your local number: <https://mt-gov.zoom.us/u/kbvwrDUfU>.

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 October 14, 2021, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, 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 dphhslegal@mt.gov.

3. The rule as proposed to be adopted provides as follows:

NEW RULE I EXERCISE OF REGULATORY DISCRETION DURING EMERGENCY During the period of time set forth in (8), the department will exercise regulatory discretion and waive strict compliance with the following categories of administrative rules to the limited extent that they conflict with the department's implementation of federal COVID-19-related guidance, waivers, or rules, as follows:

(1) Training and other training-related annual recertification requirements in congregate care facilities:

(a) provisions of ARM Title 37, chapter 34, related to services of the developmental disabilities program and the home and community-based services program (HCBS);

(b) provisions of ARM Title 37, chapter 40, related to home and community-based services for elderly and physically disabled persons;

(c) provisions of ARM Title 37, chapter 97, related to the licensure of youth care facilities;

(d) provisions of ARM Title 37, chapter 100, related to community residences; and

(e) provisions of ARM Title 37, chapter 106, related to the licensure of health care facilities.

(2) Staffing-related licensing and certification requirements in congregate care facilities:

(a) provisions of ARM Title 37, chapter 40, related to home and community-based services for elderly and physically disabled persons;

(b) provisions of ARM Title 37, chapter 90, related to the home and community-based services waiver for adults with severe and disabling mental illness;

(c) provisions of ARM Title 37, chapter 97, related to the licensure of youth care facilities;

(d) provisions of ARM Title 37, chapter 100, related to community residences; and

(e) provisions of ARM Title 37, chapter 106, related to the licensure of health care facilities.

(3) Licensing and certification requirements related to permissible premises, settings, or construction standards in situations:

(a) provisions of ARM Title 37, chapter 97, related to the licensure of youth care facilities;

(b) provisions of ARM Title 37, chapter 100, related to community residences; and

(c) provisions of ARM Title 37, chapter 106, related to the licensure of health care facilities.

(4) Telehealth face-to-face requirements for the provision of medical services:

(a) ARM 37.27.102(9);

(b) ARM 37.27.902(2) and (3), to the extent that provider manuals require face-to-face interactions;

(c) ARM 37.27.517(1)(b);

(d) ARM 37.34.3005(2), to the extent that the rates manual requires face-to-face interactions;

(e) ARM 37.40.702(8) and (9);

(f) ARM 37.40.805(1) through (3), to the extent Medicare normally requires face-to-face encounters;

(g) ARM 37.40.1005(4), to the extent such provision requires in-person meetings;

(h) ARM 37.40.1114(4), to the extent such provision requires in-person meetings;

(i) ARM 37.86.901(2);

(j) ARM 37.86.902(2)(b);

(k) ARM 37.86.3405(2);

(l) ARM 37.86.4402(1);

(m) ARM 37.87.703(1)(h), to the extent that such provision requires face-to-face interactions for home support services;

(n) ARM 37.87.903(7), to the extent the provider manual requires face-to-face interactions;

(o) ARM 37.87.1410(6)(b);

(p) ARM 37.88.101(2), to the extent the provider manual requires face-to-face interactions;

(q) ARM 37.89.501(2);

(r) ARM 37.106.1916(5);

(s) ARM 37.106.1935(4), to the extent such provision requires in-person or face-to-face contacts for targeted case management services; and

(t) ARM 37.106.2011(3), to the extent such provision requires in-person, in-home meetings.

(5) Any provision of ARM 37.82.205 and 37.84.107, to the extent that the rule would end eligibility for any individual enrolled as of March 18, 2020, unless the individual ceases to be a state resident or requests a voluntary disenrollment. Waiver of such requirements and provisions shall not exceed the end of the month in which the nationwide COVID-19 public health emergency ends.

(6) Licensing or certification requirements for congregate care facilities that require background checks, as long as the facility has submitted fingerprint background checks to the appropriate authority and has conducted other background checks, including but not limited to name background checks:

(a) provisions of ARM 37.97.132 and 37.97.140, related to the licensure of youth care facilities; and

(b) provisions of ARM 37.100.138(1) and (2) and 37.100.165(5), related to community residences.

(7) If the intensive care unit of a licensed hospital, critical access hospital, or licensed medical assistance facility is 70% occupied, swing-bed requirements in:

(a) ARM 37.40.402(1)(b)(i)(A) through (D); and

(b) ARM 37.40.405(1)(b) and (2), to the extent necessary to facilitate payment under Medicaid.

(8) This rule is intended to be of limited duration to provide flexibilities to the state's health care industry and related human service organizations as they respond to the COVID-19 pandemic. The rule is repealed and the provisions of this rule expire upon the expiration or rescinding of the nationwide COVID-19 public health emergency determination, issued under section 319 of the Public Health Service Act, 42 U.S.C. § 247d, initially on January 31, 2020, and subsequently renewed by the secretary of the U.S. Department of Health and Human Services, or at the conclusion of any transition period or of phase-down requirements relating to federal waivers issued by the Centers for Medicare and Medicaid Services in response to the COVID-19 pandemic, whichever is later.

AUTH: 50-5-103, 50-5-215, 52-2-111, 52-2-603, 53-2-201, 53-6-113, 53-6-402, 53-24-204, 53-24-209, MCA

IMP: 50-5-103, 50-5-202, 50-5-203, 50-5-204, 50-5-215, 52-2-603, 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-131, 53-6-142, 53-6-402, 53-24-204, 53-24-208, 53-24-209, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) proposes this administrative rule to continue the flexibilities available to health care providers,

health care facilities, and other entities with regulatory relationships to the department, as the state's health care industry and related human services organizations continue to respond to the COVID-19 pandemic and the recent emergence of the Delta variant as the predominant strain of the disease in Montana. The proposed rule will continue the flexibilities authorized by the emergency administrative rule adopted in MAR Notice No. 37-955, which will expire October 29, 2021, by operation of 2-4-303, MCA, which provides that an emergency rule may be effective for a period of no longer than 120 days. The statute provides further that, at the conclusion of 120 days, a new emergency rule with the same or substantially the same text may not be adopted.

The adoption of a similar rule under the non-emergency administrative rulemaking process is permitted, and the department now proposes this rule to continue, during the current nationwide COVID-19 public health emergency, the regulatory flexibilities for health care providers, health care facilities, and other entities with regulatory relationships to the department. In addition to the flexibilities in MAR Notice No. 37-955, this proposed rule includes the provisions of another emergency rule, MAR Notice No. 37-964, relating to the management of hospital swing-beds which will expire in mid-December by operation of the 120-day limit on emergency rules.

These regulatory flexibilities ensure compliance with federal waivers granted by the Centers for Medicare and Medicaid (CMS), including an 1135 Waiver, Appendix K to 1915(c) Home and Community-Based Services Waiver, and blanket waivers issued to all states by CMS. The regulatory flexibilities available under these federal waivers remain necessary for Montana to effectively continue its response to the COVID-19 pandemic and to ensure compliance with federal authorities.

The department intends for the flexibilities contained in this rule to be in effect until the end of the nationwide COVID-19 public health emergency, in coordination with requirements of federal waivers. Thus, by operation of (8), the rule's provisions will expire upon the conclusion of the nationwide public health emergency, as declared and renewed by the secretary of the U.S. Department of Health and Human Services, or at the conclusion of any phase-down of federal waivers issued by the Centers for Medicare and Medicaid Services in response to the COVID-19 pandemic, whichever is later.

The proposed rule provides for flexibilities in the following areas related to congregate care facilities, including services of the developmental disabilities program and the home and community-based services program (HCBS), the HCBS program for elderly and physically disabled persons, community residences, and health care facilities:

- Training and other training-related annual recertification requirements;
- Staffing related licensing and certification requirements; and
- Licensing, and certification requirements related to permissible premises, settings or construction standards in youth care facilities, community residences, and health care facilities.

The department proposes to continue flexibilities relating to telehealth to permit health care providers to serve Medicaid members by means of audio, video, or other telecommunications technology or media, including audio-only. Senate Bill (SB) 537 of the 67th Legislature (2021 regular session) authorizes Medicaid providers to administer medically necessary services to Medicaid members by means of telehealth and ensures that providers can receive Medicaid reimbursement. The bill provides that the services must be: a) clinically appropriate for delivery by telehealth as specified by the department by rule or policy; b) comport with guidelines of the applicable provider manual; and c) not specifically required to occur face-to-face. Because there are administrative rules that specifically require face-to-face appointments, the department must continue the telehealth flexibilities to ensure that providers can deliver and be reimbursed for services by means of telehealth, even with the passage of SB 537. The proposed rule does not include two administrative provisions referenced in MAR Notice No. 37-955 relating to telehealth in the Children's Mental Health Services Bureau because recent rule amendments have rendered those references out of date and the needed flexibilities are provided for in other provisions in this rule.

The proposed rule also ensures that the state can extend eligibility for individuals who may otherwise not be eligible if they were enrolled in Medicaid as of March 18, 2020, unless the individual ceases to be a state resident or requests voluntary disenrollment. This comports with a federal waiver granted by CMS to ensure continued Medicaid coverage through the end of the nationwide public health emergency.

The rule also includes flexibilities for licensed hospitals, critical access hospitals, and licensed medical assistance facilities in the management of swing-beds, which refers to a bed approved under federal regulations to provide either acute care or extended skilled nursing care to a patient. The purpose of this provision is to relieve a hospital of the administrative burden of determining whether a bed is available in any nursing care facility located within a 25-mile radius of the hospital before the hospital can transfer a patient to a swing-bed. The flexibility, which is available to a hospital if its intensive care unit is 70% occupied, also relieves the hospital of maintaining written documentation of inquiries made to nursing care facilities about the unavailability of an appropriate bed. Although a technically broader flexibility was provided in an emergency rule adopted in MAR Notice No. 37-964, which was filed on September 17, 2021, the provision proposed in this notice is consistent with the emergency rule given hospital circumstances at the time the emergency rule was filed. The department intends to repeal the emergency rule in MAR Notice No. 37-964 at the same time that the department adopts the proposed rule in this notice.

The department proposes to continue the flexibility relating to fingerprint background checks for employees of youth care facilities, and community residences. The flexibility granted here is limited to allowing new employees to begin working at the facilities before the results of the fingerprint background check are completed and received by the department, as long as the youth facility also conducts additional

background checks, including but not limited to name background checks. The facilities must continue to require fingerprint background checks of employees and must take appropriate action when notified of results by the department. The department does not believe that it is necessary to extend this same flexibility with respect to youth foster homes because of fingerprint technology currently available to such programs.

Fiscal Impact

Montana Medicaid receives an enhancement of 6.2% in the federal medical assistance percentage (FMAP) on Medicaid expenditures during the nationwide COVID-19 public health emergency as long as the state follows federal guidance regarding continuous eligibility for Medicaid members enrolled as of March 18, 2020. (Section (5) in the proposed rule.) The enhanced FMAP on Medicaid expenditures equates to an estimated savings to state funds (general fund and state special revenue) of approximately \$18 million per quarter during the nationwide public health emergency. Apart from the savings attributed to the enhanced FMAP, the department does not anticipate any fiscal impact.

The department intends to apply the proposed new rule retroactively to October 30, 2021.

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: Heidi Clark, 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 dphhslegal@mt.gov, and must be received no later than 5:00 p.m., November 5, 2021.

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 or may be made by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption of the above-referenced rule may significantly and directly impact small businesses to the extent that health care and related human

service organizations will have fewer regulatory obstacles in the care and treatment of those affected by COVID-19.

10. 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/ 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.