

**BEFORE THE
ADMINISTRATIVE RULES COMMITTEE
OF THE
NORTH DAKOTA LEGISLATIVE COUNCIL**

N.D. Admin. Code Chapter)	<u>REPORT OF THE</u>
75-01-03, Appeals and Hearings)	<u>DEPT. OF HUMAN SERVICES</u>
)	
(Pages 281-301))	March 13, 2018

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For its report, the North Dakota Department of Human Services (Department) states:

1. The proposed amendments to N.D. Admin. Code chapter 75-01-03 are not related to statutory changes made by the Legislative Assembly.
2. These rules are related to changes in federal statute or regulation, specifically, Title 42, Code of Federal Regulations, part 438, relating to Medicaid and CHIP Managed Care Final Rule; Title 42, Code of Federal Regulations, part 431, relating to Fair Hearings for Applicants and Beneficiaries; Title 7, Code of Federal Regulations, part 273, relating to Supplemental Nutrition Assistance Program’s Fair Hearing and Disqualification for Intentional Program Violation requirements; and Public Law 112-96, the “Middle Class Tax Relief and Job Creation Act of 2012” regarding use of Temporary Assistance for Needy Families electronic payment card in certain establishments.
3. The Department uses direct and electronic mail as the preferred ways of notifying interested persons of proposed rulemaking. The Department uses a basic mailing list for each rulemaking project that includes the county social service board directors, the regional human service centers, Legal Services offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the

Department. Additionally, the Department constructs relevant mailing lists for specific rulemaking. The Department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

The Department conducts public hearings on all substantive rulemaking. Oral comments are recorded. Oral comments, as well as any written comments that have been received, are summarized and presented to the Department's executive director, together with any response to the comments that may seem appropriate and a re-drafted rule incorporating any changes occasioned by the comments.

4. A public hearing on the proposed rules was held in Bismarck on December 15, 2017. The record was held open until 5:00 p.m. on December 26, 2017, to allow written comments to be submitted. No comments were received at the public hearing. Two written comments were received within the comment period. The "Summary of Comments" is attached to this report.
5. The cost of giving public notice, holding a hearing, and the cost (not including staff time) of developing and adopting the rules was \$2,125.84.
6. The proposed rules amend chapter 75-01-03. The following specific changes were made:
Section 75-01-03-01 is amended to add definitions of "adverse benefit determinations" and "developmental disability provider", to update citations, to clarify and update language for consistency purposes, including names and

titles of benefits or services, to update the various ways an individual may file or request an appeal, and to update language of "intentional program violations" to comply with federal requirements and guidance.

Section 75-01-03-03 is amended to update names and titles of benefits or services, to add an opportunity for a fair hearing for Medicaid benefits administered through a managed care organization and autism voucher, and to update language for consistency purposes regarding personal representatives.

Section 75-01-03-03.2 is amended to add appeals rights for a developmental disability provider regarding a ratesetting decision, update "unit" to "division" language for consistency purposes, and to clarify and update the methods of how an individual may perfect an appeal.

Section 75-01-03-04 is amended to clarify and update the methods of how an individual may withdraw an appeal before a decision is made.

Section 75-01-03-05 is amended to clarify and update an individual's responsibility and the methods of how an individual may appeal and to add who must receive the appeal.

Section 75-01-03-06 is amended to update "food stamps" to "supplemental nutrition assistance program" for consistency purposes, to update citations, and to create a time limit for appeals involving managed care organizations and autism voucher.

Section 75-01-03-07 is amended to update "aid to families

with dependent children” to “temporary assistance for needy families” language for consistency purposes and to remove “annual” from preadmission screening and resident review requirements.

Section 75-01-03-08 is amended to update and clarify when adequate notice is or is not required for benefits or services offered by the department and to update language for consistency purposes regarding program or benefit names or titles.

Section 75-01-03-08.3 is amended to update language regarding authorized representatives and “food stamps” to “supplemental nutrition assistance program” for consistency purposes.

Section 75-01-03-09 is amended to update language to reflect that certain benefit or service appeals are appealed to the department and do not involve a county agency and to update language from “food stamps” to “supplemental nutrition assistance program” for consistency purposes.

Section 75-01-03-09.2 is amended to update “unit” to “division” for consistency purposes and to remove the requirement that a representative must have authority to make binding agreements.

Section 75-01-03-09.3 is amended to update “unit” to “division” for consistency purposes and to remove the requirement that a representative must have authority to make binding agreements.

Section 75-01-03-13 is amended to update “unit” to “division” for consistency purposes.

Section 75-01-03-14 is amended to update "unit" to "division", "food stamps" to "supplemental nutrition assistance program", and "aid to families with dependent children" to "temporary assistance for needy families" for consistency purposes.

Section 75-01-03-15 is amended to update language regarding authorized representatives, "unit" to "division", and "food stamps" to "supplemental nutrition assistance program" and to establish the ability to conduct hearings by other acceptable electronic means.

Section 75-01-03-16 is amended to update language for consistency purposes regarding program or benefit names or titles, update language regarding authorized representatives, and the ability to conduct hearings by other acceptable electronic means.

Section 75-01-03-18 is amended to remove "from" to clarify language.

Section 75-01-03-20 is amended to update "provided agreement" to "provider agreement", to update a citation, and to change when the time period to appeal starts.

Section 75-01-03-23 is amended to update language from "unit" to "division".

Section 75-01-03-24 is amended to update language from "food stamps" to "supplemental nutrition assistance program".

Section 75-01-03-26 is created to establish the appeals supervisor's address.

7. No written requests for regulatory analysis have been filed by the

Governor or by any agency. The rule amendments are not expected to have an impact on the regulated community in excess of \$50,000. A regulatory analysis was prepared and is attached to this report.

8. A small entity regulatory analysis and small entity economic impact statement were prepared and are attached to this report.
9. The anticipated fiscal impact resulting from the implementation of the proposed amendments is nominal.
10. A constitutional takings assessment was prepared and is attached to this report.
11. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Jonathan Alm
Legal Advisory Unit
North Dakota Department of Human Services
March 9, 2018



Doug Burgum, Governor

Christopher Jones, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTER 75-01-03
APPEALS AND HEARINGS**

The North Dakota Department of Human Services (the Department) held a public hearing on December 15, 2017, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code chapter 75-01-03, Appeals and Hearings.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 26, 2017.

No one attending the public hearing provided comments. Two written comments were received within the comment period. The commentors were:

1. Michele Gee, Director of Economic Assistance, Department of Human Services, 600 E Blvd Ave Dept 325, Bismarck ND 58505-0250
2. Pamela Mack, Director of Advocacy Services, Protection & Advocacy Project, 400 East Broadway Suite 409, Bismarck ND 58504-4071

SUMMARY OF COMMENTS

Comment: Based on United States Department of Agriculture's Food and Nutrition Services (FNS) report generated from the Supplemental Nutrition Assistance Program (SNAP) Recipient Integrity Review, chapter 75-01-03 may need to be amended to ensure that a SNAP hearing is conducted by an impartial official who does not have a personal stake or involvement in the case.

Response:

The Department currently disagrees with the United States Department of Agriculture's Food and Nutrition Services (FNS) report findings that the Department's Executive Director has a personal stake or involvement in a SNAP case. The Department is currently in communication with FNS regarding this issue. The Department will make no change at this time. However, depending on the final outcome, the Department may need to revise its rules.

Comment: 75-01-03-03 – This Section refers to who may receive a fair hearing. Within this section a number of services offered by the Department of Human Services are identified as being eligible for an appeal; however, the language within this section does not include recipients of any of the home and community-based waivers that are administered by the Department. P&A suggest that the DD waiver, Aged & Disabled waiver, and Children's with Special Healthcare Needs, and the Autism waiver be specifically added as being eligible for appeal and a fair hearing.

N.D. Admin. Code Chapters 75-01-03
Summary of Comments
January 17, 2018

Response:

The Department will make no change at this time as the proposed amendments to section 75-01-03-03 would cover fair hearings for medicaid, which includes all medicaid waivers (developmental disability waiver, aged and disabled waiver, technology dependent waiver, children's hospice waiver, children's medically fragile waiver, and the autism spectrum disorder waiver). "Children with special health care needs" is not a name of current medicaid waiver.

Prepared by:

Jonathan Alm, Director
Legal Advisory Unit
N.D. Dept. of Human Services

In Consultation with: Stephanie Waloch, Medical Services
Michele Gee, Economic Assistance

January 17, 2018

cc: Stephanie Waloch, Medical Services
Michele Gee, Economic Assistance

MEMO

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: Stephanie Waloch, ND Medicaid Expansion Administrator

RE: Regulatory Analysis of Proposed North Dakota Administrative Code Chapter 75-01-03

DATE: September 11, 2017

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed amendments to North Dakota Administrative Code Chapter 75-01-03. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code Chapter 75-01-03. Federal rules require the proposed rules regarding managed care organizations; notices, fair hearing, and appeal processes; and intentional program violations.

Classes of Persons Who Will be Affected

The classes of person who will most likely be affected by these rules are:

- Individuals eligible for medicaid expansion and household seeking services through the autism voucher.
- Providers providing services to individuals eligible for medicaid expansion.
- Applicants or recipients of supplemental nutrition assistance program, medicaid, or medicaid eligibility that utilize the expended appeal rights.
- Applicants or recipients of economic assistance programs regarding the update and clarification as to when an adequate notice is or is not required.
- Developmental disability providers regarding the establishment of appeal rights for a ratesetting decision.
- Intermediate care facilities for individuals with intellectual disabilities and certain nursing facilities in medicaid regarding the citation change and as to when the time period to appeal starts.

Probable Impact

The proposed amendments may impact the regulated community as follows:

- Provide guidance pertaining to appeals and hearings.
- Provide additional options for the submission of appeals and fair hearing requests.
- Extends timeframe for fair hearing request for individuals receiving benefits through a Managed Care Organization (MCO).
- Potential increase in number of fair hearing requests and leading to increase in Administrative Hearings.
- Establishes appeal rights for ratesetting decision regarding developmental disability providers.

Probable Cost of Implementation

Anticipate the fiscal impact will be minimal upon adoption of the proposed rule changes.

Consideration of Alternative Methods

A review of Centers for Medicare and Medicaid Services final rules, economic assistance program federal regulations, state laws, and medicaid and economic assistance program policy, which lead to the proposed changes, was undertaken to determine the best approach to required changes. There are no alternative methods that would ensure consist understanding and compliance with federal regulations.

MEMORANDUM

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: Stephanie Waloch, ND Medicaid Expansion Administrator

DATE: September 11, 2017

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code Chapter 75-01-03.

The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This regulatory analysis pertains to proposed amendments to N.D. Admin. Code Chapter 75-01-03. Federal law does not mandate the proposed rules.

Consistent with public health, safety, and welfare, the Department has considered using regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the rules' impact on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

The proposed amendments will not alter in any material way any required compliance or reporting requirements for small entities. For these reasons, establishment of less stringent compliance or reporting requirements for small entities was not considered.

2. Establishment of Less Stringent Schedules or Deadlines for Compliance or Reporting Requirements for Small Entities

The proposed amendments will not alter in any material way any required schedules or deadlines for compliance or reporting requirements for small entities. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities was not considered.

3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

The proposed amendments will not alter in any material way any required compliance or reporting requirements of small entities. For this reason,

consolidation or simplification of compliance or reporting requirements for small entities was not considered.

4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rules

The proposed amendments do not impose any design standards or impose any additional operational standards or operational standards for enrolled Medicaid providers. For this reason, the establishment of performance standards to replace design or operational standards required for small entities was not considered.

5. Exemption of Small Entities From All or Any Part of the Requirements Contained in the Proposed Rules

The proposed rules do not exempt small entities from the requirements.

MEMORANDUM

TO: Jonathan Alm, Director, Legal Advisory Unit

FROM: Stephanie Waloch, ND Medicaid Expansion Administrator

DATE: September 11, 2017

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code Chapter 75-01-03-06

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code Chapter 75-01-03.

1. Small Entities Subject to the Proposed Rules

The small entities that will most likely be subject by the proposed rule are:

- Providers providing services to individuals eligible for medicaid expansion, and intellectual-developmental disability services and certain nursing facilities in medicaid.

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: No anticipated administrative or other costs are required by the small entities for compliance with the proposed rules.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: No anticipated probable cost to private persons or consumers for the proposed rules.

The probable benefit to private persons and consumers who are affected by the proposed rule: Private persons or consumers will be afforded additional appeal rights based on the proposed rules.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: No anticipated probable effects on state revenue expected because of the proposed rules.

5. Alternative Methods

The Department considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. Since there no anticipated administrative or other costs for small entities and no anticipated probable effect on State Revenue, exploring alternative methods was not necessary.

FISCAL IMPACT

The anticipated fiscal impact resulting from the implementation of the proposed amendments is nominal.



Doug Burgum, Governor
Christopher Jones, Executive Director

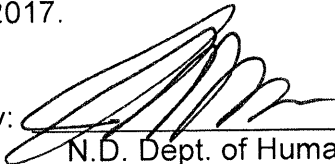
TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapter 75-01-03.

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.
2. The purpose of this proposed rule is clearly and specifically identified in the public notice of proposed rulemaking which is by reference incorporated in this assessment.
3. The reasons this proposed rule is necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.
4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than \$0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than \$0.
5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.
6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

Dated this 11th day of September, 2017.

by: 
N.D. Dept. of Human Services